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Supreme Court of the United States

OCTOBER TERM—1926

No. 229

NEW YORK DOCK COMPANY

Petitioner

against

Steamship "POZNAN," her engines, etc., and
JOHN B. HARRIS COMPANY

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

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No. 229.

NEW YORK DOCK COMPANY,
Petitioner,
against
Steamship "POZNAN," her engines, etc.,
and JOHN B. HARRIS COMPANY,
Respondents.

PETITIONER'S BRIEF.

This cause is before the Court on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, granted on November 23, 1925, on the petition of New York Dock Company, for review of the decree of that Court, dated July 23, 1923, and reported as *The Poznan*, 9 Fed. (2nd), 838, reversing the interlocutory decree of the United States District Court for the Southern District of New York, dated July 13, 1923, and reported as *The Poznan*, 297 Fed., 345, and the final decree of said District Court, dated June 17, 1924 (R., 138), and not reported, which decreed to the petitioner preferential payment from the proceeds of the Steamship *Poznan* of approximately \$20,000, in its libel *in rem* for wharfage furnished said vessel.

The jurisdiction of this Court is based on the Judicial Code sections 128 and 240, as amended by the Act of February 13, 1925.

Statement.

All of the facts are stipulated or were found by a special commissioner, whose findings were confirmed by the District Court and accepted by the Circuit Court of Appeals, and only questions of law are presented for consideration by this Court.

On November 30, 1920, New York Dock Company, being the owner of Pier 6 on the Brooklyn shore of East River, made a contract with the Polish-American Navigation Corporation, a Delaware Corporation, owner of the Steamship *Poznan*, for the use of said pier by said vessel for discharging; her said owner agreeing to pay therefor \$250 per day, said charge to begin at 7 o'clock A. M. in December 1, 1920, and continue up to the time the vessel and/or all cargo was removed, and in addition thereto the incidental expense of lights and pier cleaning at certain specified rates (R., 8-9).

During the afternoon of December 2, 1920, the *Poznan* arrived and under and pursuant to said contract made by her owner was made fast to said Pier 6. Thereafter and on the same day, at the instance of certain libellants, whose libels were for recovery of the vessel's cargo and for damages for breach of contracts of affreightment, said vessel was arrested by the United States Marshal for the Southern District of New York, who took her into his custody, but allowed her to remain fast to said Pier 6 (R., 9). These libels were afterwards consolidated under the title of *Joseph H. Davis, et al. against Steamship Poznan, et al.*

Thereafter on December 11, 1920, on the application of one of said libellants the District Court ordered the delivery of a certain part of said cargo to said libellant,

and made said order applicable to all libellants claiming parts of said cargo (R., 9, 14). Said cargo was then discharged on Pier 6 and received by the libellants in the consolidated cause, including John B. Harris Company, the respondent herein.

Before the cargo was fully discharged, the charterer of the vessel, Acme Operating Corporation, applied to the District Court for leave to have the vessel moved to another pier. At the request of the libellants in the consolidated cause, including the respondent herein, this application was denied (R., 36).

The cargo was completely discharged by February 18, 1921; delivery of the cargo from the pier was completed March 1, 1921; the vessel remained fast to the pier until and including March 11, 1921, when it was moved to another pier (R., 9).

In the meantime, the marshal having declined to pay the Dock Company's bill for wharfage without an order by the Court (R., 11-13), the Dock Company, on April 9, 1921, filed its libel against the vessel (R., 1, 3). On April 17, 1922, by order of the District Court the libellants in the consolidated cause were permitted to intervene herein (R., 4). On April 15, 1922, John B. Harris Company, one of the libellants in the consolidated cause served notice of intervention (R., 6) and filed its answer herein, denying the allegations of the libel and praying its dismissal on the ground that the wharfage was not furnished on the credit of the vessel, and further that during the time the wharfage is alleged to have been furnished the vessel was in the custody of the marshal (R., 6).

Thereafter the vessel was sold pursuant to an order in the consolidated cause, and the proceeds paid into the registry of the court. Although the marshal had declined

to pay the wharfage claimed by New York Dock Company, he included it in his bill of costs and expenses for keeping the vessel and charged his commissions on the amount thereof (R., 21, 19). The Court disallowed this wharfage item as a disbursement by the marshal, but "without prejudice to any rights of the New York Dock Company to have recourse against the proceeds if any such right there be" (R., 22-25). The Dock Company then obtained from the libellants in the consolidated cause a stipulation (in effect a stipulation for value) for the payment of such recovery as it might have herein (R., 131, 132), and has since prosecuted its libel, which is the cause now before this Court.

The District Court being of the opinion (R., 37-40) that a recovery herein could not be had at the alleged contract price, but could be had on *quantum meruit*, entered an interlocutory decree (R., 41), appointing a special commissioner to take proof and report the reasonable value of the benefit enjoyed by the libellants in the consolidated cause from the wharfage and incidental services rendered the vessel and the amount remaining due. The special commissioner reported that such reasonable value was the same as the contract price and that the balance due was \$16,628.70 and interest (R., 132-135). The report of the special commissioner was confirmed (R., 137) and a final decree was entered in accordance therewith (R., 138).

On appeal the Circuit Court reversed the interlocutory and the final decree of the District Court (R., 145-166), and a petition for a rehearing was denied (R., 167). The petition for writ of certiorari was granted November 23, 1925 (R., 167).

SUMMARY OF ARGUMENT.**Synopsis of Facts.**

The vessel began the use of the petitioner's wharf under a contract by her owner for its use by her. Shortly thereafter libels were filed against her by the respondent and others, who claimed possession of her cargo and damages for breach of contracts of affreightment. Under process issued in these libels she was arrested and taken in custody by the marshal, who allowed her to remain as she was at the petitioner's wharf, and by order of the Court and consent of the respondent and the other libellants she was permitted to discharge her cargo there and there to deliver it to them. The petitioner then filed its libel against the vessel for wharfage at the contract price. The District Court decreed it the reasonable value of the use of the wharf, and on a reference such reasonable value was found to be the same as the contract price, and final decree was entered accordingly. The Circuit Court of Appeals reversed the decrees of the District Court, and the cause is now before this Court for the review of such decree of reversal.

The Opinions of the Courts Below.

The District Court held that the petitioner was not entitled to a maritime lien for the wharfage furnished while the vessel was in custody, but decreed the petitioner preferential payment of such wharfage from the proceeds of the vessel on principles of justice and equity.

The Circuit Court of Appeals, in reversing the decrees of the District Court, held that the petitioner had no maritime lien on the vessel for wharfage furnished *after* her arrest by the marshal, because she was then in

custodia legis and therefore withdrawn from navigation; that the petitioner had no maritime lien for the wharfage furnished *before* her arrest, because such wharfage was under a contract with the owner of the vessel instead of with her master and there was no express agreement or understanding that such lien should arise, and that therefore such wharfage was not furnished on the credit of the vessel, but on the personal credits of her owner. Furthermore, the Circuit Court of Appeals interpreted the opinions of the District Court as basing the decree for preferential payment on the ground that the petitioner had an "equitable lien" on the vessel, as that term is commonly used, and stressed the fact that the petitioner had no such lien; that such lien could not take precedence over a maritime lien, and that therefore the relief granted was improper.

The Petitioner's Contentions.

On behalf of the petitioner it is contended that the theory on which the decree of reversal is based is erroneous for the following reasons:

I. The petitioner's claim for wharfage furnished while the vessel was in *custodia legis* is a privileged debt against the vessel and her proceeds as a necessary incident of such custody. It is an incident of the prosecution and has been appropriately called an "*expense of justice*." Had it been actually paid by the marshal, he could have charged it in his bill against the proceeds of the vessel; since it was not so paid it may be enforced by libel *in rem* or petition against the proceeds. It is on the same footing as the marshal's fees and is a debt of the highest rank of

privilege. The petitioner should not be deprived of compensation for the use of its property simply because it did not demand payment from the marshal in advance. The fund primarily liable is still under the control of the Court, which should see that justice is done (see Point I, p. 10).

II. The petitioner's claim for wharfage furnished while the vessel was in *custodia legis* is a privileged debt against her and her proceeds for the further reason that it was a necessary *expense of operation* in the discharge of her cargo, which, by consent of the respondent and by order of the Court, was permitted while she was in custody. When the owner of a vessel withdraws her from maritime commerce and stores her away or uses her for non-maritime purposes she ceases to be a subject of maritime jurisdiction and no maritime lien can arise against her. The same is true when she goes into the hands of a sheriff and by operation of law passes out of the maritime jurisdiction, ceasing to be a legal entity and becoming a mere chattel. But when she is in custody of the marshal, she is still a vessel, a legal entity, and to the extent that she is permitted to pursue her usual maritime activities she is liable for the services rendered her as necessary incidents of such activities. The true test of exemption from maritime liens is not whether the vessel is in custody of the law, but whether she has ceased to act like a vessel (see Point II, p. 28).

III. Under the general maritime law the petitioner's claim for wharfage is a privileged debt against the vessel and her proceeds notwithstanding—(1) the wharfage was furnished under a contract with her owner instead of

her master; (2) there was no agreement by the parties that a lien should arise, and (3) there is no proof of credit to the vessel.

1. The lien for wharfage arises whether the contract therefor is with the owner or the master. The master is selected by the owner as his agent; and the agent can have no greater authority than his principal. The contract is primarily the contract of the vessel as a legal entity and either is authorized to speak for her in making it.

2. A maritime lien arises solely by operation of the maritime law as an incident of the service. Indeed, the parties cannot by agreement create a maritime lien. A lien created by agreement would be a mortgage or pledge and would be subordinate to maritime liens.

3. The rule as to proof of credit to the vessel never applied to claims for wharfage, but has always been restricted to claims of materialmen for "repairs, supplies, and other necessaries"; that is, to claims for those things incident to the *outfitting* of the vessel; and not to those things incident to her *operation* and which are rendered directly to her as a going concern, such as wharfage, salvage, seamen's wages and the like (see Point III, p. 40).

IV. Under the Merchant Marine Act of June 5, 1920, the petitioner is entitled to a maritime lien on the vessel and her proceeds for the wharfage services rendered her. While proof of credit to the vessel was never necessary to give rise to a maritime lien for wharfage, because it was not included in the technical phrase "*repairs, supplies and other necessaries,*" all doubt has been removed

by that Act, which dispensed with such proof of credit when the claim is for furnishing "*repairs, supplies, towage, use of drydock or marine railway, or other necessities.*" This phraseology includes not only those things incident to the *outfitting* of a vessel and technically known as "repairs, supplies and other necessities," but also includes those things incident to the *operation* of a vessel. Under the familiar rule of *eiusdem generis* wharfage is included because it has been held to be "most analogous to towage, pilotage, or salvage" (see Point IV, p. 48).

V. Both under the general maritime law and under the Merchant Marine Act of June 5, 1920, the petitioner's lien for wharfage arose against the vessel before her arrest, and such lien was not terminated by operation of law upon her arrest. The marshal is a custodian merely. His office is to preserve and not destroy rights. When the vessel was arrested she was using the petitioner's wharf under a contract made by her owner. This contract was not from day to day, but for the time the vessel and her cargo remained there. The marshal allowed her to remain where she was, made no new contract for her wharfage and did not undertake to terminate the existing contract. On the contrary, by order of the Court and consent of the respondent she was allowed to discharge and deliver her cargo there. The petitioner's lien attached before the arrest. It was an incident of the contract and the service thereunder. The vessel was permitted to receive the service contracted for and may not escape the lien. Therefore, neither by act of the parties nor by operation of law was the lien terminated (see Point V, p. 52).

VI. The question of an "equitable lien" is not an issue in this case. The Circuit Court of Appeals erred in basing its decree of reversal partly on the ground that the petitioner has no "equitable lien" in the sense that term is commonly used. It is conceded that the petitioner has no such lien, and it is respectfully submitted that the District Court did not hold that it had. What the District Court held was that the petitioner was entitled to preferential payment from the proceeds of the vessel on principles of equity and justice and this is what was decreed. The reversal mistakes the form of the opinion for the substance of the decree (see Point VI, p. 54).

It is respectfully submitted that the foregoing contentions on behalf of the petitioner are amply supported by the following argument and the authorities cited.

THE ARGUMENT.

POINT I.

The petitioner's claim for wharfage furnished the Steamship "Poznan" after her arrest and while she was in custodia legis is privileged under the General Maritime Law as an "expense of justice" and is a lien upon the vessel and her proceeds.

The Circuit Court of Appeals held that the petitioner had no maritime lien for wharfage furnished the *Poznan* after her arrest, because she was in custody and withdrawn from navigation (R., 166). The learned Circuit Judge delivering the opinion of the Court said (R., 155):

"If the vessel is in *custodia legis* she is for the time being withdrawn from navigation and no maritime lien arises for wharfage charges incurred during the period she is so withdrawn."

This statement is too broad, and unless qualified it is erroneous. It is true if the custody is under a state law, because such law can take no cognizance of a ship as a legal entity, and for the time being it is entirely withdrawn from the maritime law and the admiralty jurisdiction. It is a mere chattel of wood and iron floating on the surface of the waters. *Taylor v. Carryl*, 20 How., 583. Such statement is erroneous if the custody is under the maritime law as administered by a court of admiralty, because such law knows a ship only as a legal entity—"a personality * * * competent to contract and * * * individually liable for her obligations." *Tucker v. Alexandroff*, 183 U. S., 424, 438. As such she is arrested, and such she remains while in custody; and if she is sold, she is sold as a ship. In no other capacity does the maritime law recognize her. When in such custody maritime liens may arise against her. The analogy between a ship as a legal entity and a corporation has been recognized by this Court (see Point III, p. 44).

A vessel may use a wharf in either of two ways: First, it may be used as a necessary incident to the administration of justice, when she is arrested and subjected to the satisfaction of the demands against her by a court of admiralty. The expense of a wharf when so used has been appropriately called an "expense of justice." *The Phebe*, 1 Ware (354), 360; Fed. Cas. 11065. Second, the wharf may be used as a necessary incident to the operation of the vessel as the chief agency of maritime commerce. In each case the service is rendered to the vessel

and the maritime law makes the price or value of such service a privileged debt against the vessel and her proceeds, whether she is in custody or not. This is what is confusingly called a maritime lien (*Harney v. The Sydney L. Wright*, Fed. Cas. 6082-a). It is simply the right to share in the proceeds of the vessel in preference to her owner and her owner's general creditors. It is a lien only in the sense that a corporation creditor has a lien on the corporate assets and a partnership creditor has a lien on the partnership assets. It is not a lien at all, but legal right to preferential participation in the assets of the legal entity. Therefore all maritime liens are the same except in the order of their preference, although the methods of enforcing such right may vary, as will be shown.

The question of the right to participate in the proceeds of a vessel for wharfage furnished her while in *custodia legis*, as an "expense of justice," is not new. The precise question had been decided in the Second Circuit before the instant cause arose.

The Case of the "St. Paul" Exactly in Point.

The case of *The St. Paul*, 271 Fed., 265, also decided by the Circuit Court of Appeals for the Second Circuit, is so exactly in point that it requires more than passing consideration. In that case, after the arrest of the vessel and while she was in custody of the marshal, by order of the Court and consent of the parties the marshal was

"* * * authorized to permit Hudson Navigation Company to move the said steamship from her present anchorage to Pier 32, N. R., and to make an arrangement with the said Hudson Navigation Company for the discharge of (the cargo at said

pier); the amount of the cost of discharging, storing, and caring for the cargo to be subject to the approval of the court; the said Hudson Navigation Company to look to the said cargo for the payment of the cost of said discharging.' Accordingly the Hudson Company took charge of the ship, in the sense of directing where she should lie and removed the cargo until July 17, when the discharge was complete; but the pier alongside contained cargo for a long time afterwards."

From July 17, when the discharge was complete, to October 8, a period of 82 days, the vessel remained at the pier empty. Hudson Navigation Company, owner of the pier, claimed that under said consent order the cargo should stand the expense of wharfage for the whole time, including the 82 days the vessel remained there empty; but this claim was disallowed by an order which was not complained of. Hudson Navigation Company then presented to the marshal its bill made out against "S. S. *St. Paul* and her owners" for the wharfage for the period of 82 days, from July 17 to October 8, when the vessel remained at the pier empty. The marshal did not actually pay this bill, but included it in his bill of costs against the proceeds of the vessel. The District Court disallowed most of this item of the marshal's bill of costs on the theory that the vessel's use of the pier for most of the 82 days was caused by the Hudson Navigation Company's action in obtaining a stay of the order for the sale of the vessel. From the disallowance of this item Hudson Navigation Company appealed.

From the foregoing it clearly appears that during the whole of the time from the arrest of the vessel to October 8, when she was removed from the pier, she was in cus-

tody of the marshal, and that Hudson Navigation Company "took charge" of her only "in the sense of directing where she should lie"; that the vessel was relieved of the lien for wharfage during the period of discharging, by the consent order of the Court making the expense of discharging a charge against the cargo; and that the controversy was only over wharfage accruing entirely after July 17, when the discharge was completed and the consent order had ceased to be operative. It clearly appears further that the marshal did not authorize the berthing of the vessel at Pier 32 and did not promise to pay for her berth there and did not pay, and that she remained there without the order of the Court or the consent of the libellants. If it were possible to conceive of a case where there would be no maritime lien for wharfage furnished a vessel while in *custodia legis*, the case of the *St. Paul* would certainly be such case. And yet it was held that there was a maritime lien against the *St. Paul* and her proceeds of a superior rank and preferential payment from her proceeds was allowed. Circuit Judge HOUGH, delivering the opinion of the Court in the *St. Paul* case said:

"But this wharfage item is not even a 'disbursement,' for the marshal never authorized berthing the *St. Paul* at Pier 32, and never promised to pay for such berth—indeed, this is admitted. What he has done is this: He has presented in his bill the *demand of Hudson Company to be paid for services rendered the ship—a kind of service which might have been enforced by libel in rem or by petition against the proceeds of the res.*

"* * * but we feel justified in treating the claim as it was below, viz. as a *demand for preferential payment*, or as an *asserted superior lien* on the proceeds of the steamship." (Italics ours.)

The similarity of the facts in the *St. Paul* case and the case at bar is obvious. Precisely the same question was presented in each, and such was the conclusion reached by the District Court (R., 38, 40). But it is respectfully submitted that the Circuit Court of Appeals has decided the question in exactly opposite ways. If the learned Circuit Judge delivering the opinion of the Court had not so emphatically distinguished the two cases, the decision in the case at bar would undoubtedly have overruled the decision in the *St. Paul* case, but he said (R., 161):

"The learned judge who decided this case in the court below relied upon the decision of this court in *The St. Paul*, 271 Fed., 265. And counsel at the argument in this court told us that that case is on all fours with the case at bar, and fully sustains the decree below. We do not at all agree with any such conclusion. There is nothing in *The St. Paul* case which lends support to the doctrine now contended for. The question which the District Judge decided in the present case instead of being as he assumed the question which was decided in the *St. Paul*, is precisely the one which was not presented, or litigated, or decided in that case. The wharfage in that case was incurred pursuant to an order made by the court and with the consent of all the libelants. It was made in the only way in which a maritime lien can be (fol. 220) validly created against property in *custodia legis* namely by an order of the court."

The Circuit Court of Appeals by its reversal of the decree of the District Court has denied this petitioner a lien upon and preferential payment from the proceeds of the Steamship *Poznan* for the wharfage of the vessel while in custody of the marshal, notwithstanding the fact that

the *Poznan* remained at the petitioner's pier with the sanction of the Court and by consent of the parties.

Both of these decisions can not be right, and with great respect we propose to show that the decision in *The St. Paul* case was correct and that the decision in the case at bar was erroneous.

Wharfage as an "Expense of Justice" has Highest Rank of Privilege.

The case of *The Phebe*, 1 Ware (354); 360; Fed. Cas. 11065, is also exactly in point, and shows petitioner's claim to have the highest rank of privilege. In that case Judge WARE discusses with learning and clearness the character of the lien or privilege for wharfage furnished a vessel while in *custodia legis*. In that case the vessel was sold and the marshal did not himself pay for her wharfage while in his custody, but settled for it out of the proceeds and, after retaining his fees, paid the residue into the registry of the Court. Thereafter the proctor for the libellant moved for an order requiring the marshal to pay the whole proceeds into the registry. In granting this order the Court said:

"All persons having claims against them (the proceeds), of whatever kind they may be, must make them in Court, and the money is never paid out but to one who shows a legal right to it. The propriety of this practice is obvious, if it be considered only in reference to the *expenses of the prosecution*. *These expenses form a lien, or are a privileged debt against the property.* 1 Valin, Comm. p. 362. Cleirac, Jurisdiction de la Marine, art. 5, note 15. *All of the expenses of justice naturally stand in the same rank of privilege.* All

persons having claims of this kind have a right to look to the proceeds of the sale for their pay, and all are entitled to be paid concurrently. Now the case may happen in a protracted and expensive course of litigation, or the accidental destruction of a large part of the property arrested, that the whole proceeds of the sale may not be enough to pay the expenses of the suit. In such a case it would be inequitable for one to receive his pay in full, and for another to be turned over to a personal demand against the parties to the suit. Equity requires in such a case, and so is the law of the court, if the balance of the expenses is not obtained from the parties to the suit, who are liable for them, that the proceeds of the sale should be divided among the several claimants, *pro rata*.

" * * * The officer who executes the precept for the sale, has no more authority to settle and pay one claim than another; he has no more authority to allow and pay any of the expenses which have accrued in the prosecution, than he has any other privileged debt. *The liens created in favor of these debts, do not differ from any other liens except in the rank of their privilege.*" (Italics ours.)

The lien for wharfage here referred to is not a possession lien, giving the wharfinger the right to detain the vessel until his debt should be paid, but the privilege or lien created by the maritime law. It may not be enforced by withdrawal of the vessel from the custody of the law and proceeding summarily or in a different jurisdiction; but the Court having jurisdiction will always respect this *jus in re* and grant relief on petition or libel of intervention or consolidation of libels. In the case just cited the Court said further:

"But in this case, after the vessel was arrested on process from the Court, she was in custody of the

law, and subject to the order of the Court, and continued to be so until she was sold. It cannot be admitted that the wharfinger, by permitting her to lie at his wharf, withdrew her from the custody of the law or the possession of the Court. His lien for wharfage, admitting it to exist, was not one which could be enforced by a detention of the vessel, but only by an application to the Court, and that not in exclusion, but in concurrence with other liens standing in the same degree of privilege."

For a long period of time this has been accepted as settled law, and is the common practice of the courts.

In The America, Fed. Cas. 288, the Court quotes Judge WARE in *The Phebe*, Fed. Cas. 11065:

" * * * the learned judge was speaking of a claim for wharfage, accruing while the vessel was under arrest; and this claim, as one of the expenses of the legal proceedings, should, of course, have been paid concurrently with the other expenses of such proceedings."

In *The Free Trader*, 1 Brown Adm. 72; Fed. Cas. 5091, the Court said:

"The marshal is, by law, entitled to receive from the fund in Court the actual necessary expenses he has paid, or obligated himself to pay, and no more. His claim is like any other claim or lien on the fund in Court * * *."

In *The Allegheny*, 85 F., 463, the question was whether a marshal, who had incurred large expenses in caring for and preserving a vessel in his custody, was entitled to reimbursement thereof out of the proceeds of her sale, without awaiting the final decree in the cause. It was held that he was, the Court saying:

"The marshal is obliged to pay the whole proceeds of the sale into the registry of the Court, but the law requiring him to do so was not intended to delay him in the recovery of his costs. The marshal was bailee of the property, and responsible for its safe delivery to the parties interested, and bound to answer in damages for the loss sustained through his fault or neglect. Whatever he has necessarily or properly expended for its preservation, he is entitled to recover. His claim is a preferred one. Its priority is not disputed by any one. The money deposited in the registry does not bear interest, and there does not appear to be any reason why the marshal should be compelled to submit to his loss and await a final decree in the cause which may be indefinitely postponed, at the whim of pleasure of the litigants, before receiving the costs which he has lawfully incurred in preserving the property."

To the same effect is *The Georgeanna*, 31 Fed., 405.

In *The F. Merwin*, 10 Ben., 403; Fed. Cas. 4893, it was expressly held that the reasonable and necessary expense of wharfage of a vessel while in custody of the marshal may properly be taxed in his bill of costs and expenses. This case was cited with approval by the Circuit Court of Appeals for the Second Circuit in *The Neptune*, 252 Fed., 129, and the principal was there held to be applicable to the expense of raising a vessel which sank while in custody of the marshal.

No Express Agreement by Marshal Necessary.

But the respondent has contended that there is no maritime lien for the wharfage furnished by the petitioner while the *Poznan* was in the custody of the marshal, because the marshal made no express contract for the use

of the wharf, and because he disclaimed liability for payment therefor (R., 12, 13); and the Circuit Court of Appeals seems to have given weight to such disclaimer (R., 158). If an acknowledgment by the marshal of liability to pay the wharfage were necessary to make such wharfage a privileged debt against the vessel, such acknowledgment was made by him. While he disclaimed liability on January 7, 1921, he afterwards acknowledged liability by including such wharfage in his bill of expenses for the custody of the vessel and actually charged his commission of 2 per cent. thereon (R., 19), although he had not actually paid it. He did exactly what was done in the *St. Paul* case, and, indeed, what is the common practice in the Southern District of New York. This wharfage was thereafter disallowed by the Court as a part of the marshal's disbursements, but with distinct proviso that it was "without prejudice to any rights of the New York Dock Company to have recourse against the proceeds if any such right there be" (R., 25). In doing this the District Court undoubtedly had in mind the ruling of the Circuit Court of Appeals in the *St. Paul* case, that if the marshal had not actually paid the wharfage the proper remedy of the wharf owner was by libel *in rem* or petition against the proceeds.

However, no express contract or acknowledgment of liability by the marshal was necessary. He had no more right to keep the *Poznan* at the petitioner's wharf than any private owner of the vessel would have, and upon the use of the wharf by the vessel the law implied a promise by some one to pay. If the marshal had paid, he would have done so on behalf of the vessel and could therefore have charged the amount in his bill against her proceeds. Since he did not pay, the liability rests on the

vessel or her proceeds and on the respondent, the then libellant, at whose instance the vessel was held. The use of the wharf by the marshal to safely keep the vessel would undoubtedly render him personally liable notwithstanding his denial of liability, were it not for the fact that he was known to be only acting as the agent of disclosed principals. It is idle to argue that the petitioner must receive no compensation for the use of its property, because, as an indulgence to those responsible for the arrest of the vessel, it did not demand payment in advance. Had this respondent been dissatisfied with what the marshal did with the vessel the proper course was to apply to the Court for relief. This was not done; on the contrary the respondent opposed the removal of the vessel from the petitioner's wharf, when application was made to the Court for such removal.

The case of *The Novelty*, 9 Ben., 195; Fed. Cas., 10368, is strikingly in point. In that case the marshal arrested the vessel under process *in rem*, directing him to seize and safely keep her. At the time she was lying upon a marine railway, where she was duly arrested by the marshal. She was in bad condition and if removed without repairs would have sunk. In sustaining a *libel in rem* for the dockage, District Judge BENEDICT said:

"The marshal received no other instructions than that contained in his process, and there was nothing for him to do but to keep the vessel upon the dock where he found her, for he had no funds in his hands to expend in repairs nor any authority to make repairs, and he could not remove the boat from the dock without danger of her destruction. Under such circumstances I see no other way but for him to pay whatever is proved to be a reasonable and proper sum for the use of the dock *while*

the boat was in his custody. Section 829, Rev. St., has no relation to expenses of preserving a ship such as are here in question. Expenses like these may be allowed to be made when necessary, and *they are chargeable upon the property saved.*

*** I am of the opinion, therefore, that if paid by the marshal it may be taxed by him as a necessary item of expense of preserving the vessel *while in his custody.*

"It is to be regretted that the parties interested in this boat permitted her to remain upon the dock until a bill for dockage equal to her value had been incurred, when timely application for her sale as perishable would have saved the greater part of the expense. *For this unfortunate result the parties who lose thereby are alone responsible, because although aware of the position of the boat they made no effort to save the expense.*" (Italics ours.)

In that case there was no order of the Court creating the lien and there seems to have been no express agreement by the marshal to pay dockage; but in the case at bar, although there was no express promise by the marshal to pay, there was an order of the Court permitting the wharf to be used. It may be noted further that in that case there was no overt act by the libelant approving the continuance of the vessel on the dock, while in the case at bar the respondent objected to the removal of the *Poznan* from the petitioner's wharf.

There is nothing very peculiar in this provision of the maritime law that the wharfage of a vessel in custody of the law shall be a lien on her and her proceeds. Under the law of the sea a vessel is a legal entity. "She acquires a personality of her own * * *. She may also become a *quasi bankrupt*"; *Tucker v. Alexandroff*, 183 U. S., 424, 438. To depart from the language of the admiralty, when

taken into the custody of the law she and her proceeds are held in trust for the payment first of the expenses of administering the trust and then for the payment of her obligations.

"It is a general principle that a trust estate must bear the expenses of its administration."

Trustees v. Greenough, 105 U. S., 527, 532.

In *Meddaugh v. Wilson*, 151 U. S., 333, 342, referring to certain assignees in bankruptcy, this Court said:

"Their services in this respect not being to any party or parties but in respect to the property itself, and to secure its proper application among all parties interested, it is clearly in accordance with settled rules of equitable jurisprudence, as well as with the practice in bankruptcy proceedings, that compensation for their services, including the pay of their counsel, should be made a direct charge upon the property, and a charge prior in right to the claims of creditors or stockholders."

The Custody of Receivers.

In *The Resolute*, 168 U. S., 437, this Court held that the fact that seamen rendered services to a vessel while in the hands of a receiver was not absolutely inconsistent with a lien *in rem* for their wages, citing *Paxson v. Cunningham*, 63 Fed., 132, where a vessel was libeled for a collision which occurred while she was in the hands of a receiver and the libel was upheld, even as against the receiver.

In *The Williamette Valley*, 66 Fed., 565, the Circuit Court of Appeals for the Ninth Circuit upheld a libel in California for repairs furnished there to a vessel in the

hands of a receiver appointed by an Oregon court. There seems to have been no doubt as to the lien, but only as to its enforcement. It is a general principle that one court will not interfere with property in the lawful custody of another court, but when such custody ceases, then other courts may deal with the property according to the rights of parties interested therein. *Moran v. Sturges*, 154 U. S., 256. So when services are rendered a vessel while operated by a receiver the only question is whether the maritime lien arising therefor shall be enforced before the receivership is ended or after. This question rarely arises, because, as this Court said in *The Resolute, supra*, "We cannot assume that the Court would authorize its receiver to run these vessels without making some provision for preferential payment of their current expenses." But on principle the existence of the maritime lien and the right to enforce it seem clear. A vessel as a legal entity never goes into the hands of a receiver. All the receiver gets is what the owner of the vessel had, a chattel with the right to devote it to purposes of maritime commerce. If he does so, it becomes a vessel and passes into the admiralty and maritime jurisdiction, and is entirely beyond the control of the receiver and the court appointing him, except insofar as a private owner might control her; that is, by directing her voyages and business or withdrawing her from maritime commerce. If a court of admiralty should refrain from exercising its jurisdiction over a vessel so operated, it would be entirely through comity.

Respondent Estopped from Claiming Proceeds as Against Petitioner.

There is a further reason why it was erroneous to refuse the petitioner preferential payment from the proceeds of the vessel. Assuming that the arrest of the vessel by the marshal terminated the contract made by her owner, her arrest and her subsequent use of the petitioner's wharf was at the instance and for the benefit of the respondent and the other libelants in the consolidated cause of *Joseph H. Davis* against *The Poznan*, since in that cause they recovered the vessel's cargo valued at nearly \$2,000,000, and caused the vessel to be sold to answer damages aggregating \$1,216,000 (R., 146). In these circumstances said respondent and these other libelants are liable to the petitioner for such use of its wharf; and they are therefore, estopped from claiming the proceeds of the vessel to the exclusion of the petitioner and it is so important and so eminently just that those who render services in aid of the administration of justice shall be compensated, that they not only have a lien on the property in the custody of the Court, but they may recover from the respondent at whose instance the service was rendered and may even hold the respondent's proctors personally liable, if there is no other way to obtain such compensation.

This question was presented in a rather peculiar way in the case of *The Georgeanna*, 31 Fed., 405, which arose in the Southern District of New York. There the libel was by seamen, who, under the rule, were permitted to sue without giving any security for costs. After the arrest of the vessel the claimants, pursuant to the rule of the Court, paid into the registry the amount claimed in the libel, with interest, and the costs of the officers already accrued, together with the further sum of \$250 to

cover costs, and thereupon received delivery of the vessel from the marshal. Upon the trial the libelants were adjudged to have no lien and the libel was dismissed. The claimants demanded the return of the whole money deposited, because they had been adjudged without fault. The marshal claimed his fees out of the deposit. As the deposit was in lieu of and as a substitute for the stipulation for value provided for in R. S. 941, he claimed that it was security for his costs and expenses in keeping the vessel under the mandate of the Court, and his claim was allowed by the Court.

"Whenever a stipulation is taken in an admiralty suit, for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators liable to the exercise of all those authorities on the part of the Court, which it could properly exercise, if the thing itself were still in its custody."

The Palmyra, 12 Wheat., 1, 10.

The theory of the decision in *The Georgeanna, supra*, is that the deposit under the rule of the Court was a mere substitute for the stipulation for value under R. S. 941, and was therefore a substitute for the vessel itself; and that since the marshal's fees, being an expense of justice, were a privileged claim against the vessel, it was a privileged claim or lien on the deposit. The decree was not against the deposit as a substitute for a stipulation for costs, because such a stipulation only secures such costs as are decreed against the stipulators, and there could be none in this instance, because the claimant was adjudged without fault. Most of marshal's claim in this instance was for keeping the vessel in his custody, that

is, for the dockage, and the Court attributed the accumulation of such fees to the claimant's laches in not sooner having her released.

The Court in its opinion in *The Georgeanna, supra*, cited R. S. 857, which provides that "the fees of officers, except those which are directed to be paid out of the treasury, shall be recovered in like manner as the fees of the officers of the States respectively for like services are recovered"; and then pointed out the analogy between the marshal having a vessel in custody and the sheriff holding attached property, on which, in the State of New York, the sheriff has a lien for his costs and expenses (New York Civil Practice Act., Secs. 970, 1101). The Court further justified its decision by quoting Judge HALL in *Re Mealy*, 2 N. B. R., 128, as follows:

"The general rule in regard to payment of the fees of officers of the Court undoubtedly is that such fees must be paid, in the first instance, by the parties or persons for whom the service is performed, subject, of course, in respect to the party upon whom the burden shall ultimately rest, to the decree or judgment of the Court upon the final disposition of the case."

In *The Georgeanna*, the Court went even further and pointed out that not only were the suitors liable for officers' costs and expenses incurred at their instance, but that in the State of New York it had been long settled that their attorneys and solicitors were likewise personally liable (*Adams v. Hopkins*, 5 Johns., 252; *Gadski-Tauscher v. Graff*, 44 Misc., 418; *Ruhloff v. Colts*, 174 N. Y. S. 159). The Court then added:

"The justice of the above provisions is evident from the fact that the marshal is, in effect, the

bailee of the property in his charge, for the benefit of all the parties to the cause. Acting under the mandate of the Court, he is responsible to each and all of the parties interested for the due delivery of the property as finally determined. . . . The fact that the libelant, or his proctor, may be liable, as the employer of the marshal, does not conflict with this right to payment on delivery for charges in protecting the property."

So much for the use of a wharf as an expense of justice.

The second way in which a vessel may use a wharf, that is, as a necessary incident of her *operation* as an agency of commerce, will be discussed in the next Point.

POINT II.

The petitioner's claim for wharfage furnished after the arrest of the vessel is privileged under the General Maritime Law for the further reason that it was a necessary expense of her operation while in custody, incurred by consent of the respondent and by permission of the Court.

In denying the petitioner preferential payment from the proceeds of the vessel, the learned Circuit Judge delivering the opinion of the Circuit Court of Appeals said (R., 166) :

"But we find nothing in the facts of this case . . . which took the case out of the rule that where the ship is in *custodia legis* no lien arises for wharfage services."

In the preceding point it was shown that a lien for wharfage *does* arise against a vessel and her proceeds in

custodia legis, when furnished as a necessary incident to the prosecution of a suit and therefore as an expense of justice. The purpose of this point is to show that, in making the foregoing statement, the Circuit Court of Appeals overlooked material facts peculiar to this case, and that owing to such facts the petitioner is also entitled to a maritime lien for the wharfage furnished after the arrest of the vessel as a necessary incident to her operation.

After the arrest of the *Poznan* and while she was in custody of the marshal, by the consent of the respondent and by order of the Court she was permitted to function as a vessel and continue her operation and pursue her usual business by the discharge and delivery of her cargo at the petitioner's wharf. In the libel of A. M. Campen's Sons, Inc., one of the parties to the consolidated libel, to which the respondent was also a party, the Court ordered the delivery of the cargo to the claimants thereof by the charterer of the vessel (R., 14-17); and, upon the request of the cargo claimants, including the respondent in the case at bar, the Court denied the application of the charterer of the vessel for an order requiring the owner of the vessel to remove her from the petitioner's wharf to another wharf (R., 36). In obedience to said two orders the *Poznan* remained at the petitioner's wharf and there, through her charterer or owner delivered her cargo, although during the whole time she remained in the custody of the marshal and under the control of the Court.

The Correct Rule as to Maritime Liens While Vessel is in Custodia Legis.

It is incorrect to say that no maritime lien can arise against a vessel in custody of the law. A more correct statement of the rule is that there can be no such lien

unless the one claiming such lien has been permitted by those responsible for the arrest of the vessel or by the Court to render to the vessel a service for which a maritime lien would arise were she not in custody. No permission for the lien is necessary, but only for the service. Such permission may be quite general, as was the case in *The Young America*, 30 Fed., 789, 790, 791, where, after the vessel was arrested the libelant and the owner of the vessel directed the marshal not to tie her up or put a keeper on her, "and she was permitted to run about the harbor in her usual business," and obtained supplies for which she was libelled. In sustaining a maritime lien for such supplies the Court referred to the rule that liens could not arise against a vessel in custody, and said:

"So far as respects the parties to the cause, the benefits of the rule may be waived; and the rule cannot properly be applied at all where, by direction of the parties, the arrest is formal only, and is not designed to be followed by any actual possession of the marshal. . . .

"The rule excluding subsequent liens cannot be extended to vessels that are not actually, as well as constructively, in the marshal's possession. Where a plaintiff, as in this case, obtains only a nominal arrest of a vessel, and virtually directs that she be left to pursue her ordinary business, with its attendant liabilities to other persons, in contract or *in tort*, he must be held to have waived the benefit of the custody of the court as a protection against other liens, and to be estopped from claiming, as against third persons, the exemptions that belong only to a vessel in actual custody."

Or the permission for the vessel to "pursue her ordinary business" may be limited and for a special pur-

pose, as was the case in *The St. Paul*, 271 Fed., 265, where, while the vessel was in custody, a wharf owner was permitted to take the vessel from her anchorage in the harbor to his wharf and was allowed a maritime lien for wharfage accruing while she remained there.

In order that a maritime lien may arise for a service rendered a vessel in custody, such service need not be incidental to her locomotion, or navigation, strictly speaking. In *The Nissequogue*, 280 Fed., 174, such liens were allowed for supplies furnished and for repairs made after the arrest and while she was in custody of the marshal tied up to a wharf, by consent of her owner and master and without objection by the marshal. In the same case a lien for wages of the crew of the vessel was denied, which was perfectly proper, for the reasons hereinafter stated.

Cases Distinguished.

The Circuit Court of Appeals cites twelve court decisions and four text writers in support of the statement that when a "vessel is in *custodia legis* she is withdrawn from navigation and no lieu arises for wharfage charges incurred during the period she is so withdrawn" (R., 154-157). However, it is respectfully submitted that not a single one of these supports the conclusion reached. In *Beard v. Marine Lighterage Corporation*, 296 Fed., 146, the question now under discussion was not before the Court, but the use there of the phrase "out of commission or withdrawn from navigation" was entirely proper if it is construed in the light of what is here said in regard to the other cases cited. The learned Court wholly misconceived what amounts to *withdrawal from navigation* within the meaning of these authorities. The word

"navigation" has become more or less current in the reports in this connection in a rather loose sense. Strictly speaking "navigation" expresses the idea of moving or maneuvering a ship. To express the idea now under consideration the courts sometimes use the term "navigation and commerce." The idea is more accurately expressed by the phrase "maritime activities," and such is the expression used by the Court in *The Andrew J. Smith*, 263 Fed., 1004. Having this distinction in mind, it will be seen that the cases cited by the Court as authority fall into three groups, to neither of which does the case at bar belong: (1) those where all maritime activity by the vessel had been terminated by act of the parties; (2) those where all maritime activity by the vessel had been terminated by operation of law; and (3) those where the maritime lien claimed was for seamen's wages.

(1) To the first group belong *The C. Vanderbilt*, 86 Fed., 785; *The Andrew J. Smith*, 263 Fed., 1004; *The Pulaski*, 33 Fed., 383; and *The Fortuna*, 206 Fed., 573. In each of these cases all maritime activities had ceased by act of the parties, and the ship had ceased to be a ship. In *The C. Vanderbilt*, navigation was closed and the vessel was tied up at a pier for the season; she was "out of commission"; she had "abandoned for the time the purpose of her construction." "Mariners are discharged, the boat is shut up, like a closed house, and left in idleness to a caretaker or watchman." And the Court emphasized such cessation of maritime activity as the reason for denying a maritime lien for wharfage by saying:

"Whatever is done to operate a ship, to aid her physically in the performance of her mission, viz.

to take freight or passengers, to carry freight or passengers, to *unload freight* or passengers, and to preserve her while so doing, is a maritime service." (Italics ours.)

In *The Andrew J. Smith*, the vessel was totally disabled and was laid up for repairs; repairs were abandoned and she sank at the pier where she was. The Court said:

" * * * Wharfage cannot be treated as a basis for a maritime lien when it is equivalent to storage or dockage of a vessel completely, for the time being, withdrawn from navigation, *as if drawn out on the bank*, or on ways, to lie like a chattel in storage, entirely separate from its maritime activities." (Italics ours.)

In *The Pulaski*, navigation on the Great Lakes was closed for the season; the vessel was tied up at Detroit and received wheat "to be held and stored on board said schooner until the opening of navigation in the following spring unless sooner discharged by the shippers; and if not discharged" to be transported to Buffalo or elsewhere, different rates of compensation being charged for the storage and for the transportation. The Court said:

"If the storage were a mere incident of the transportation * * * I should have no doubt that the vessel would be liable * * *. But, in this case, the contract is primarily for storage, and the transportation is a mere contingency, possible or probable in the future."

In *The Fortuna*, the vessel was laid up, the master had been discharged, and a watchman was in charge.

(2) To the second group belong *The Estaban de Anunano*, 31 Fed., 920; *The Mary K. Campbell*, 31 Fed., 840.

In each of these cases the vessel had been levied upon under a State law and taken into possession by a sheriff, and by operation of law she passed out of the admiralty and maritime jurisdiction, ceased to be a ship—a legal entity with a "personality of her own" "competent to contract" and "individually liable for her obligations"—and went into the custody of the State law as a mere chattel. Obviously there could not be a maritime lien in such cases. *Taylor v. Carryl*, 20 How., 583. It has been held that the money paid for the aid to a vessel in her business, which she derives from the use of a wharf "is not rent, but wharfage." *The Kate Tremaine*, 5 Ben., 60; Fed. Cas., 7622. It is equally true that what a sheriff pays for keeping a vessel in his custody is not wharfage, but rent or storage.

(3) To the third group belong *The Augustine Kobe*, 37 Fed., 696; *The Erinach*, 7 Fed., 231; *The Philomena*, 200 Fed., 873; *The Astoria*, 281 Fed., 618, and *The Nissequogue*, 280 Fed., 174. In each of these cases the arrest was by the marshal and the custody was that of the maritime law. Though in custody the ship was still a ship, a legal entity "with a personality of her own," and in no other capacity did the court of admiralty and the maritime law know her. But in each case a maritime lien for seamen's wages after the arrest was denied, for the reason that the voyage was terminated. It was not because the ship had ceased to be a ship, but was on account of the peculiarity of the seaman's contract and character of his duties. The seaman is employed for the voyage and if the voyage is terminated he is discharged and two months' additional pay is allowed him by statute. As was said by the Court in *The C. Vanderbilt, supra*, "the mariner

is an operative"; he operates the ship on her voyage, and when the voyage is at an end his occupation is gone. In each of these cases the maritime lien was denied from the date of the seaman's discharge or the date the voyage was abandoned or terminated; that is, from the time the seamen ceased to be a seaman. It is axiomatic that if there is no sailing there can be no sailor's wages. This is strikingly illustrated in the case of *The Nissequogue*, *supra*, where the voyage was abandoned, but not until after the vessel had been for some time in the custody of the marshal. In that case the lien for the wages of the crew was allowed up to the date of the abandonment of the voyage but denied after that date, but the lien for repairs even after that date was allowed because they were necessary for the vessel in her then condition, and were not objected to by the marshal. Though not then on a voyage she was still a vessel and liable as such for a service rendered her if necessary and permitted by her custodian.

None of these cases is even remotely analogous to the case at bar. The petitioner's demand is for wharfage, a service never necessary or even possible when the vessel is being navigated, in the strict meaning of that word, but a necessity when the vessel is engaged in two of her most important functions, viz., receiving her cargo and discharging her cargo. The *Poznan* used the petitioner's wharf to discharge her cargo, worth approximately \$2,000,000 (R., 135) and thereby to earn such freight money as might be due her (R., 16). And this was done by order of the Court and consent of the respondent, which received its share of said cargo, and which has therefore waived any protection that custody of the law might afford and is estopped from now claiming such protection.

It is respectfully submitted that there is no similarity between the facts in this case and the facts in the case of *The Advance*, 60 Fed., 766, affirmed 71 Fed., 987, as suggested by the Court below (R., 158). In that case the owner of *The Advance*, a corporation, had contracted for the "entire use" of the pier "for any and all purposes" by the corporation itself and any and all of its fleet of several vessels and by its patrons. It was for wharfage at this pier that *The Advance* was libelled by the owner of the pier. It was impossible to separate her wharfage from other things for which she could not be liable. Her owner's contract was undoubtedly a lease of the pier and the wharfage was therefore furnished by her owner as lessee of the pier and not by the libellant as owner of the pier. The owner of the pier was properly denied a maritime lien on the vessel on the principle which this Court applied in *Piedmont Coal Co. v. Seaboard Fisheries Co.*, 254 U. S., 1.

Petitioner's Contract Expressly for Wharfage.

In the instant case the contract for the wharfage services is thus set forth in the agreed statement of facts (R., 8) :

"On or about November 30, 1920, New York Dock Company and Polish-American Navigation Corporation by C. J. Nevelson, Treasurer, entered into an agreement for the use of said Pier No. 6 by the S. S. *Poznan* to discharge, Polish-American Navigation Corporation agreeing to pay therefor \$250.00 per day, charge to commence from 7:00 A. M., December 1, 1920, and to continue up to the time the steamer left and/or all cargo was removed, and agreeing to pay in addition thereto

for lights at the rate of \$1.00 per light, per night or part thereof, for cleaning pier cost plus ten per cent., and for carting dirt \$2.50 per one horse load and \$1.30 for dump ticket when required, and \$5.00 per two horse load and \$2.15 for dump ticket when required."

It will thus be seen that the contract was made *exclusively for the benefit of the vessel*. The agreement was "*for the use of Pier No. 6 by the said S. S. Poznan to discharge.*" No other vessel could use it, nor could the owner of the vessel use it personally for any purpose whatever. It was not, and indeed could not, be found that the contract was a lease of the pier to the owner of the vessel personally. The contract shows that the owner of the pier, the petitioner herein, was to furnish the lights and do the cleaning incident to the use of the pier, and presumably the petitioner, as owner of the pier, was charged with the duty of rendering to the vessel any other service necessarily incident to its use of the pier.

The contract was for the wharfage of the vessel by the petitioner, as wharfage has heretofore been defined by the Circuit Court for the Second Circuit and understood in the Port of New York.

"'Wharfage' is money paid for landing goods upon or loading them from a wharf. * * *

"It is too well known to need citation or reference to papers that, when a steamship engages a berth, wharfage by that name is due and payable, not only while she lies alongside, but while the discharging space is occupied by her cargo. This is the immemorial custom of this port." (The Port of New York.)

Old Dominion S. S. Co. v. City of New York, et al., 286 Fed., 155, affirmed 286 Fed., 157 (C. C. A., 2).

To the same effect are the following cases:

The Allan Wilde, 264 Fed., 291;

The Rathlin Head, 292 Fed., 867.

"Wharfage is strictly a maritime lien. It might be preferred against the boat without reference to the relation of the libellant to the owners of the boat. It is a lien good in the hands of whoever holds it, for the amount justly due, and could be enforced against the vessel itself, without reference to the ownership thereof. * * * A lien for wharfage is made, under the general maritime law, a lien next in rank to wages."

The Shrewsbury, 69 Fed., 1017, 1020.

"The money paid for the aid to the vessel in her business, which she derives from the use of the wharf, is not rent, but wharfage."

The Kate Tremaine, 5 Ben., 60, Fed. Cas. 7622.

Indeed *wharfage* is a kind of service incapable of rendition to a natural person, or any legal entity except a vessel.

No services were included except such as are necessarily incident to wharfage, that is, lights and the removal of dirt on the pier caused by discharging the cargo. If in this case payment is claimed for any service for which the vessel is not liable, it is easily separable from the amount due for wharfage, for which the vessel is liable. The inclusion in a claim against a vessel of items for which she is not liable does not defeat items for which she is liable. In *The St. Jago de Cuba*, 9 Wheat., 409, the claim was for repairs, but included an item for wharfage. The Court denied a lien for the repairs but allowed a lien for the wharfage.

**Respondent Has Adopted Rule of Law Contended for
by Petitioner.**

If anything further is needed to show that a maritime lien may arise or accrue against a vessel which is in *custodia legis* it will be found in the rule of law applied in the respondent's own libel against this very same vessel, reported as *The Poznan*, 276 Fed., 418, 435 (R., 123). In that case the respondent claimed and recovered damages for breach of a contract of affreightment and for negligence in the discharge of the cargo and the Court held such recovery to be a maritime lien on the vessel. An element of the damages for the difference between the value of the shipment at the date and place it should have been delivered and the value at date it was delivered in New York, which latter date was after the vessel had been arrested. Therefore a part of said damage and the maritime lien therefor accrued while the vessel was in the custody of the law. And that part of the maritime lien which was for negligence in discharging the cargo arose in the first instance after the arrest and while the vessel was in *custodia legis*, since the discharge did not begin until after the arrest and covered a long period. So that the respondent's maritime lien against this vessel both arose and accrued, in part, at the very time the petitioner furnished the wharfage for which a maritime lien has been denied. It is peculiarly inappropriate and unjust that one rule of law should thus be applied to this part of the respondent's claim and a different rule applied to a similar claim of the petitioner in the distribution of the proceeds of this same vessel.

From the foregoing it clearly appears that the facts peculiar to this case make the defense of the custody of

the law wholly insufficient and that the learned Circuit Court of Appeals erred in sustaining such defense.

As most of the petitioner's claim is for wharfage furnished *after* the arrest of the vessel, this and the preceding point, for all practical purposes, should be decisive of this case in the petitioner's favor. However, the learned Circuit Court of Appeals denied the petitioner a lien even for that part of the wharfage which accrued *before* the arrest, and in doing so fell into further error of such far reaching effect, that it is discussed in the next point.

POINT III.

Under the General Maritime Law the petitioner's claim for wharfage is a privileged debt against the vessel and her proceeds notwithstanding—(1) the wharfage was furnished under a contract with her owner instead of her master; (2) there was no agreement by the parties that a lien should arise, and (3) there is no proof of credit to the vessel.

The learned Circuit Judge, delivering the opinion of the Circuit Court of Appeals said (R., 158, 159) :

"As Chief Justice Marshall said in *The United States v. The Schooner Little Charles*, 1 Brock. 347, 354, 'The vessel speaks and acts by the master.' In this case the wharfage contract was not made with the master of the vessel but with the owner * * *.

"A maritime lien arose only where credit was given to the vessel, not where it was given to the owner or charterers. If the agreement was made with the owner, unless there was an *express agreement for a lien* or the circumstances indicated that the services were rendered or the supplies furnished

with the *understanding that the ship would be responsible*, no lien arose . . . In this case the credit was not given to the ship, and the contract was not made with the master of the ship but by the ship's owner." (Italics ours.)

And again (R., 165, 166) :

"But in the instant case it does not appear from the agreement made between the Dock Company, as owner of the wharf, and the Polish-American Company, as the owner of the ship, that any *intention existed to make the ship a security for the wharfage and other expenses which were incurred.*"

"But we find nothing in the facts of this case which indicated that any *intention existed to make the ship a security for the charges incurred.*" (Italics ours.)

This statement of the law is erroneous because (1) it draws a sharp distinction between the liability of a vessel for wharfage when the contract therefor is made by her owner and when it is made by her master; (2) it makes a maritime lien for wharfage depend upon the agreement of the parties that it shall arise, if the contract for such wharfage is made by the owner of the vessel, and (3) it makes the maritime lien for wharfage depend on questions of credit.

Vessel Bound by Contract of Either Her Owner or Her Master.

1. In the case of *The Little Charles*, *supra*, cited by the Court which was a case of forfeiture for not reporting the vessel, the Chief Justice makes it clear why "the

vessel speaks and acts by the master." He says that it is because:

"The master is selected by the owner, as his agent, for the purpose, among others, of reporting the vessel on her coming into port."

The authority of the agent cannot be greater than that of his principal. A contract for wharfage is the vessel's contract and she is primarily liable. It is immaterial whether her owner or her master speaks for her in making such contract.

In *Ex parte Easton*, 95 U. S., 68, 73, 77, this Court said:

"Compensation for wharfage may be claimed upon an express or an implied contract, according to the circumstances, where a price is agreed upon for the use of the wharf, the contract furnishes the measure of compensation; and when the wharf is used without any such agreement, the contract is implied, and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred."

"Viewed in the light of these considerations, it is clear that a contract for the use of a wharf by the *master or owner* of a ship or vessel is a maritime contract, and, as such, that it is cognizable in the admiralty; that such a contract, being one made exclusively for the benefit of the ship or vessel, a maritime lien in the case supposed arises in favor of the proprietor of the wharf against the vessel for payment of reasonable and customary charges in that behalf for the use of the wharf, and that the same may be enforced by a proceeding *in rem* against the vessel, or by a suit *in personam* against the owner." (Italics ours.)

In instant cause it is immaterial whether the recovery is at the contract price or the reasonable value, because they have been found to be the same (R., 132-135).

Maritime Lien Never Created by Agreement.

2. A maritime lien arises by operation of the maritime law and is in no way dependent on the agreement or understanding of the parties for its creation. It is a necessary incident of the rendition of the service, and it is wholly unnecessary to stipulate that the credit shall be given on account of the vessel. *The Emily Souder*, 17 Wall., 666; *The J. E. Rumbell*, 148 U. S., 1.

Indeed in *The Saratoga*, 204 Fed., 952, the Circuit Court of Appeals for the Second Circuit expressly held that the owner of a vessel could not create a maritime lien. Such an agreement would be in the nature of a pledge or mortgage, and it is well settled that a mortgage is not and cannot be a maritime lien, and under the General Maritime Law is always subject to such liens. *The Rupert City*, 213 Fed., 263, 266; *The J. E. Rumbell*, 148 U. S., 1; *Schuchardt v. Babbidge*, 19 How., 239. Hence the ship mortgage of June 5, 1920, chapter 250, sec. 30, was necessary to give certain mortgages of a vessel a "preferred" status with respect to certain maritime liens.

In *Carroll v. Bancker*, 43 La. Ann., 1078, the Court said:

"Privilege and pledge are totally different things, for the Code says:

"'Privilege is a right the nature of the debt gives a creditor, and enables him to be preferred before other creditors, even those who have mortgages' (R. C. C. 3188); but 'a pledge is a contract by which a debtor gives something to his creditor as a security for his debt' (R. C. C. 3133)."

The Vessel a Capable Legal Entity.

Under the maritime law a vessel is a legal entity, a maritime corporation, so to speak. A contract for wharfage is her contract. Being her contract, she and her proceeds, that is, the assets of the maritime corporation, are liable for her debts in preference to claims of her owner or her owner's creditors; and this is all a maritime lien is. The rule is thus stated in 38 *Corpus Juris*, 1198:

"Under the American rule as finally established the vessel is itself looked on as a responsible being; and a maritime lien attaches directly, independent of questions of ownership or agency, the liability of the ship as such being the main thing, and the question of ownership being incidental."

The rule as thus stated is supported by the following decisions of this Court: *Tucker v. Alexandroff*, 183 U. S., 421; *The Barnstable*, 181 U. S., 464; *The John G. Stevens*, 170 U. S., 113; *The China*, 7 Wall., 53; *The Homer Ramsdell Transportation Co. v. La Comp. Gen. Transatlantique*, 182 U. S., 406. In this respect there is no distinction between claims arising in contract and those arising *in tort*. *The John G. Stevens, supra*, page 117.

"In this Court the ship has been personified so far as to incur liability in cases where the owner could not be held. *The China*, 7 Wall., 53. See *The Malek Adhel*, 2 How., 210, 231; *Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn Eastern District Terminal*, 251 U. S., 48, 53."

In re East River Co., 266 U. S., 355, 367.

The analogy between a vessel as known to the maritime law and a corporation is striking, and has been several times referred to by this Court. It is discussed at

length and with great learning by Judge WARE in *The Rebecca*, 1 Ware, 187; Fed. Cas. 11619. Mr. Justice BRADLEY, delivering the opinion of this Court in *Norwich Co. v. Wright*, 13 Wall., 104, a leading case on limitation of liability, pointed out such analogy and cited the opinion of Judge WARE in *The Rebecca*, as leaving "little to be desired on the subject." It was again referred to by this Court in *The Scotland*, 105 U. S., 24, 30.

The legal entity of a land enterprise with limitation of personal liability is usually indicated by the word "Incorporated," "Limited" or "Societe Anonyme," or its abbreviation. But in case of a maritime venture, that is, a vessel on a voyage, this is unnecessary, because by the law of the sea all vessels in operation are legal entities with limitation of the personal liability of their respective owners. And each voyage is a separate venture. Since a voyage continues from the time a vessel leaves her home port to the time she returns, this explains why under the general maritime law as declared by this Court in *The General Smith*, 4 Wheat., 438, and later cases, there is no lien or privilege for "repairs, supplies and other necessaries" furnished a vessel in her home port, notwithstanding the strong assaults on the doctrine, which have culminated in the Merchant Marine Act of 1920. These are the things which go to outfit a vessel, and, if furnished in her home port, are in the nature of the owner's capital investment, as the vessel itself is. If furnished in a foreign port, they are incident to her operation during a voyage, and are chargeable to the venture.

**Proof of Credit to Vessel Never Necessary in
Claiming Wharfage.**

3. The rule of proof of credit to the vessel to give rise to a maritime lien never applied to claims for wharfage, but has always been restricted to claims of "materialmen" for "repairs, supplies and other necessaries."

"Those are commonly called materialmen, whose trade is to build, repair, or equip ships, or to furnish them with tackle and provision (necessary in any kind)."

The Neptune, 3 Hagg., 129, 142.

This rule as to proof of credit was abolished even as to the claims of materialmen by the Maritime Liens Act of June 23, 1910, and the Merchant Marine Act of June 5, 1920, amending same. It was never applicable in claims for wharfage, towage, pilotage, salvage and seamen's wages, which are services necessarily rendered directly to the vessel as incidents of her *navigation or operation*, as distinguished from her *outfitting*.

This distinction was recognized by this Court as early as the case of *The St. Jago de Cuba*, 9 Wheat., 409, in which there was a claim for repairs which was denied as a lien against the vessel, and also a claim for wharfage which was allowed as a lien, this Court saying:

"There is, however, one item in this account, to the amount of 300 or 400 dollars, which is certainly good against all the world. This was for wharfage
 * * *"

The case of *The St. Jago de Cuba, supra*, is cited along with other cases, by District Judge BENEDICT, in *The Kate Tremaine*, 5 Ben., 60; Fed. Cas. 7622, in which he said:

"Thus far, this doctrine has been applied by the Supreme Court only to the contracts of materialmen. The present is not the case of a materialman, but of a wharfinger. A wharfinger is not a materialman. His demand is of a different character, and is given a different rank in the order of payment. This has been several times adjudged."

This distinction is thus stated by Judge ROBERT M. HUGHES in 26 *Cyclopedia of Law*, 766:

"As to all maritime liens except those of materialmen, the rendition of the service to the vessel or the bringing her into such relations with any one as creates a maritime cause of action against her impresses upon her a maritime lien irrespective of questions of credit or ownership."

Since a maritime lien can not be created by agreement or understanding of the parties, but arises solely by operation of law, it necessarily follows that the only way any agreement or understanding of the parties can defeat such lien is by way of waiver or estoppel. There is nothing in the facts of the case at bar to show either. Certainly the mere fact that the contract was made by the owner instead of the master does not amount to either (*Ex parte Easton, supra*). There is no suggestion of fraud or laches or any conduct on the part of the petitioner which could operate as an estoppel. Nor is there any suggestion of a waiver. On the contrary, it clearly appears that the petitioner consistently and persistently insisted on its lien upon the vessel (R., 11, 12, 17). Merely charging the wharfage to the owner of the vessel or accepting part payment from her owner either in cash or a note is not a waiver. *The Emily Souder*, 17 Wall., 666; *The Bird of Paradise*, 5 Wall., 545; *The Kimball*, 3 Wall.,

37; *The St. Lawrence*, 1 Black, 522. The burden is on the party asserting it to show an intention to waive the lien. *The Guy*, 1 Ben., 112; affirmed in 9 Wall., 758.

But, if proof of credit to the vessel was ever required to give rise to a maritime lien for wharfage, it is no longer necessary by virtue of the provisions of the Merchant Marine Act of June 5, 1920, as is shown in the next Point.

POINT IV.

**Under the Merchant Marine Act of June 5, 1920,
the petitioner is entitled to a maritime lien on the
vessel for the wharfage services rendered her.**

The Court below denied the petitioner a lien under the general maritime law because it did not appear that the wharfage was furnished on the credit of the vessel. This was in effect a decision that wharfage is not a necessary within the meaning of the Merchant Marine Act of 1920. It is true the Court below (R., 161) declined to express an opinion on this point, because it was considered immaterial as to wharfage accruing while the vessel was in *custodia legis*, which the opinion says was "practically" the entire period for which the bill was rendered. But *some* wharfage *did* accrue prior to the arrest of the vessel. Therefore, as to the part of the wharfage accruing prior to the arrest, the Court below in effect held that the Act of 1920 afforded no protection. And if the petitioner is correct in the contention that a valid lien having once attached is not terminated by the mere arrest, then said decision affects the whole amount claimed.

While proof of credit to the vessel was never necessary to support a maritime lien for wharfage as was shown in the last Point, any doubt which might have existed is

removed by the Merchant Marine Act of June 5, 1920, which is merely declaration of the maritime law in this respect, but unfortunately doubt still exists.

In the Eastern District of New York it was held that the Act is *not applicable* to wharfage. *The Suelco*, 286 Fed., 286. In the District of Maryland it was held that the Act is applicable to wharfage. *The West Haven*, 297 Fed., 534. In the District of Massachusetts and the District of Maryland the Act has been held applicable to stevedoring. *United States v. Certain Subfreights of S. S. Neponset*, 300 Fed., 981; *Gray's Harbor Stevedoring Co. v. United States*, 298 Fed., 159. But the opinion of the Circuit Court of Appeals for the Second Circuit in *The Muskegon*, 275 Fed., 348, seems to indicate that the Act is *not applicable* to stevedoring. In the District of Massachusetts the Act has been held *applicable* to the use of a canal, *In re Burton S. S. Co.*, 3 Fed. (2nd), 1015; and also to services rendered in fumigating baggage as a legal requirement for the landing of passengers. *The Susquehanna*, 3 Fed. (2nd), 1014.

However, the Act has not been construed by this Court in this respect. The question involved is one of general importance, is of constant recurrence, and should be settled by this Court to end the conflict and confusion in the lower courts as to the proper interpretation of the Act. The weight of judicial opinion seems to be that the Act is applicable to wharfage and similar services, and therefore that it is not necessary to allege or prove that credit was given the vessel when the service was rendered on the order of the owner.

The Act of 1920 provides:

"Subsection P. Any person furnishing *repairs, supplies, towage, use of dry dock or marine railway,*

or other necessities, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel." (Italics ours.)

Act of June 5, 1920, C. 250, Sec. 30, Subsec. P.

The Maritime Liens Act of June 23, 1910, contained a similar provision, but the language was "*repairs, supplies, or other necessities, including the use of dry dock or marine railway.*"

"Any person furnishing repairs, supplies, or other necessities, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel."

Act of June 23, 1910, Ch., 373, 36 Stat. L. 604.

In *Piedmont Coal Co. v. Seaboard Fisheries Co.*, 254 U. S., 1, this Court made clear the purpose of the Act of 1910, which was to do away with the necessity of alleging and proving credit to the vessel when these things were furnished her in her home port or were ordered by her owner. The phrase "repairs, supplies and other necessities" had acquired a definite technical meaning, and it was held that it did not include wharfage, but was restricted to those things furnished by materialmen, that is, to those things used in *outfitting* a vessel, and did not include those things necessarily incident to the *navigation* or *operation* of the vessel.

The change in the language in the Act of 1920 is significant. By the inclusion of the word "towage" and placing the phrase "and other necessaries" at the end of the series, the meaning of such phrase was enlarged, and under the doctrine of *ejusdem generis* now includes wharfage, which, of course, is a necessity, and akin to towage and use of marine railway and drydock. As was said by this Court in *Ex parte Easton*, 95 U. S., 68, 75, wharves are well-nigh as necessary as ships. And in *The George W. Elder*, 159 Fed., 1005, a lien for "drydockage" was allowed under a "wharfage" statute.

Wharfage is "most analogous to towage, pilotage, or salvage."

The Allianca, 56 Fed., 609, 613.

Stevedoring is most analogous to seamen's services, since "formerly the work was done by the ship's crew."

Atlantic Transport Co. v. Imbrokek, 234 U. S., 52, 62.

The phrase "other necessaries" as used in the Act of 1920 has lost its former technical meaning, and now includes things which are of the same general character of any of the items enumerated. It now includes not only those things necessary for the *outfitting* of a vessel, that is supplies, repairs and other necessaries of that class, but also those services necessarily incident to the *navigation* or *operation* of the vessel, such as towage, wharfage, pilotage, salvage, stevedoring and seamen's wages.

No good reason has been assigned for requiring a different rule of proof for wharfage, pilotage and the like from that required for towage and use of marine railway and dry dock.

Therefore by virtue of the Act of 1920 it was not necessary to allege or prove that credit was given the vessel, and the Circuit Court of Appeals erred in not allowing the petitioner a maritime lien under that act.

POINT V.

Both under the General Maritime Law and under the Merchant Marine Act of June 5, 1920, the petitioner's lien for wharfage arose against the vessel before she was arrested and such lien was not terminated by operation of law upon her arrest.

The petitioner's lien, which attached before the arrest of the vessel, was not terminated by act of the parties or order of the Court upon her arrest. This will not be denied. Neither was such lien terminated by the arrest as a matter of law.

The contract was for wharfage at a fixed rate, so long as the wharf was used for berthing the vessel and the discharge and delivery of her cargo. This was the vessel's contract and a maritime lien arose by operation of law the moment the vessel was made fast to the pier. Such lien survived the arrest of the vessel and continued so long as she was permitted to continue to receive the wharfage service. Particularly is this true in this case, because such permission was by order by the Court, and by consent and for the benefit of the respondent. The lien and the service are inseparable; the one cannot be destroyed while the other continues.

In the case of *The Bold Buccleugh*, 7 Moore P. C., 267, quoted and followed by this Court in *The John F. Stevens*, 170 U. S., 113, referring to a maritime lien, the Court said:

"This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached."

And this is true whether the lien arises *in tort* or contract. In *The John G. Stevens, supra* (p. 117), this Court held that "a maritime lien or privilege" constitutes "a present right of property in the ship, *jus in re*"; and further

" * * * that a maritime lien is created as soon as the claim comes into being, has long been held to be equally applicable to all claims, which can be enforced in admiralty against the ship, whether arising out of tort or of contract. *General Ins. Co. v. Sherwood*, 14 How., 351, 363; *The Creole*, 2 Wall. Jr., 485, 518; *The Mayurka*, 2 Curtis, 72, 77; *The Young Mechanic*, 2 Curtis, 404; *The Kiersage*, 2 Curtis, 421; *The Yankee Blade*, 19 How., 82, 89; *The Rock Island Bridge*, 6 Wall., 213, 215; *The China*, 7 Wall., 53, 68; *The Siren*, 7 Wall., 152, 155; *The Lottawanna*, 21 Wall., 558, 579; *The J. E. Rumbell*, 148 U. S., 1, 10, 11, 20; *The Glide*, 167 U. S., 606."

The respondent's contract of affreightment was not terminated by the arrest of the vessel and the damages for breach thereof continued to accrue as a lien against the vessel while she was in custody (see p. 39); and neither was the petitioner's contract and lien for wharfage terminated.

The marshal is a custodian merely. His office is to preserve and not to destroy rights.

"When a vessel is arrested in admiralty, under the process of the court, the law requires that she

be kept safely by the marshal for the benefit of the parties to the cause, *and of all others interested in her.*" (Italics ours.)

The Young America, 30 Fed., 789.

The Court below decided that no maritime lien could arise, that is, originate, while the vessel was in *custodia legis*. Assuming that this is true when the vessel is withdrawn from maritime commerce, either by act of her owner or by the Court having her in custody, it by no means follows that a maritime lien, which has once attached and which is a privilege given by the maritime law to a creditor as an incident of the contract of service, is terminated by her arrest, particularly when, at the request or by the consent of those responsible for the arrest, the Court permits the vessel to continue to receive the service contracted for.

POINT VI.

The question of an "equitable lien" not an issue in this case.

The last four pages of the opinion of the Circuit Court of Appeals, beginning at the middle of page 162 of the Record, are devoted to a discussion of the subject of equitable liens, referring to the rights administered by courts of chancery under that name, and it was concluded that the petitioner was entitled to no such lien. The correctness of this conclusion is conceded. But the question was never an issue in this case. The petitioner never claimed an equitable lien or any other kind of a lien *eo nomine*. The libel alleges the rendition of the wharfage service, and the prayer is simply that the vessel be condemned and sold and that the amount due for such

service be paid out of the proceeds according to the course and practice of the Court.

The question of an "equitable lien" grew out of the opinion of the District Court, dated March 23, 1923 (R., 37), in granting the interlocutory decree (R., 41). In that opinion the learned District, now Circuit, Judge, delivering the opinion of the Court, said this petitioner had an "equitable claim" on the proceeds of the vessel (R., 38). The proctors for the respondent insisted that this meant an "equitable lien" as that phrase is commonly used. That such was not the meaning of the District Court is clear from its supplemental opinion, dated July 13, 1923 (R., 40), in which it said "of course it is true that an equitable lien against a ship will take no precedence over a maritime lien"; but it is added:

"The lien here established was an equitable lien against the lienors' own rights in the vessel arising after she was in custody. It was a lien on their liens, justiciable in this court only because the Court had custody of the vessel under the arrest. That was the holding in *The St. Paul*, 271 Fed. R., 265."

This was merely calling the petitioner's right, its *jus in re*, by the wrong name. At most it could only amount to giving the wrong reason for a righteous decree. However, the petitioner made timely request that it be not prejudiced even by such misnomer (R., 43). It was a mere shadow until the learned Circuit Court of Appeals gave it substance by giving the absence of an equitable lien as one of the reasons for denying the petitioner the privilege of participating in the distribution of the proceeds of the vessel for the satisfaction of its claim for wharfage.

What the District Court really decided was that the petitioner had the right to preferential payment from the proceeds on *equitable principles*, and this was entirely proper. It was unnecessary to give this right a name. The error now complained of is that the decree of reversal denies the petitioner relief because it has no "equitable lien," and not because, on *equitable principles*, it is not entitled to relief. The authorities cited in the opinion of the Circuit Court of Appeals are ample to show that while courts of admiralty are not courts of equity they are equitable courts and administer relief on equitable principles.

CONCLUSION.

The decree of the Circuit Court of Appeals should be reversed and its order for a mandate and the proceedings thereunder vacated.

Dated, New York City, January 29, 1927.

Respectfully submitted,

JOSEPH S. AUERBACH,
CHARLES E. HOTCHKISS,
CHARLES H. TUTTLE,
ALEXANDER J. FEILD,

Counsel for the Petitioner.

Supreme Court, U. S.

F. L. D.

MAR 15 1927

WM. R. STRASBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1926

—
No. 229
—

NEW YORK DOCK COMPANY

Petitioner

against

Steamship "POZNAN," her engines, etc., and

JOHN B. HARRIS COMPANY

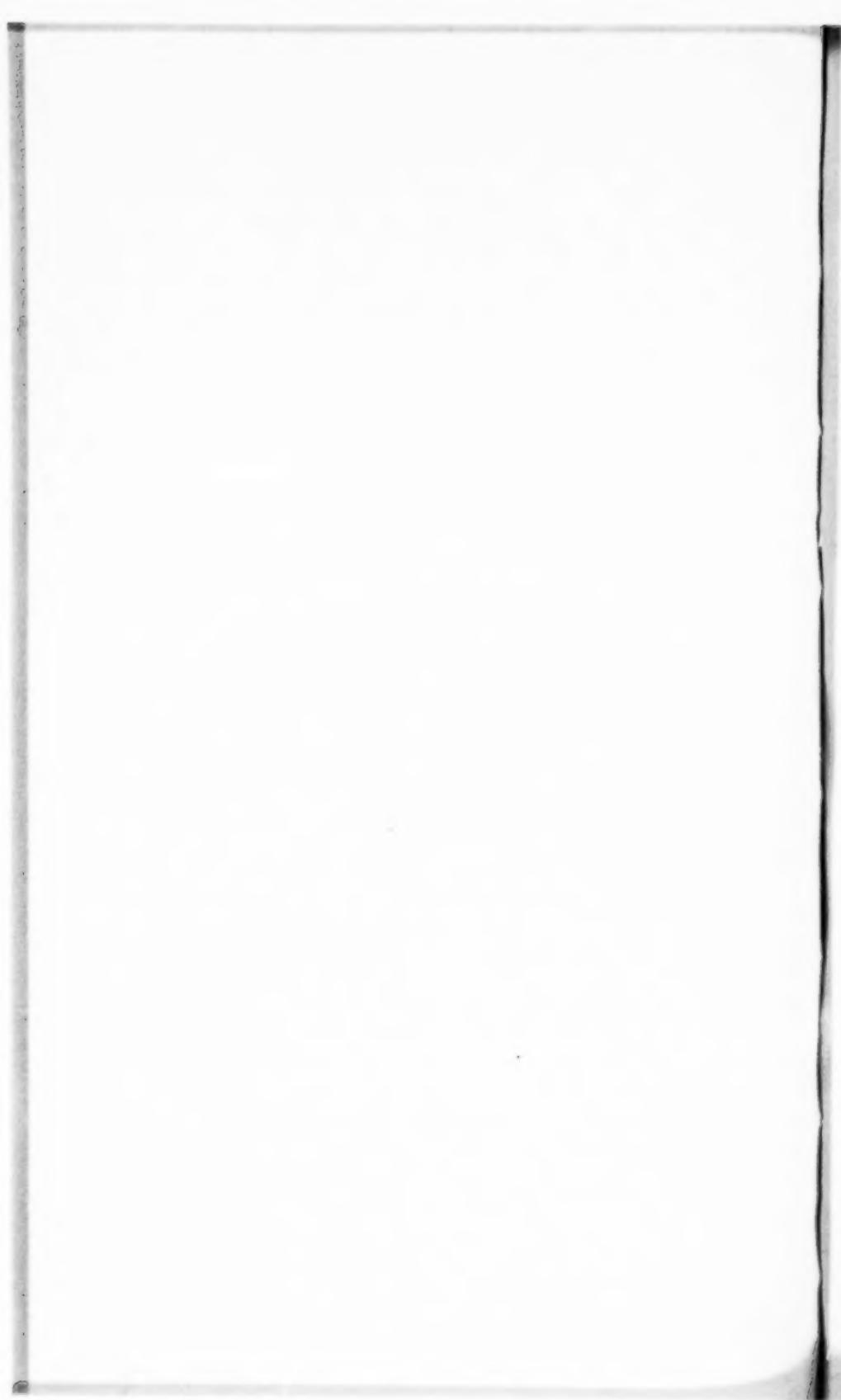
Respondent

—
ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

—
JOSEPH S. AUERBACH
CHARLES E. HOTCHKISS
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Supreme Court of the United States

OCTOBER TERM, 1926.

NEW YORK DOCK COMPANY,
Petitioner,

against

Steamship "POZNAN," her engines, etc.,
and JOHN B. HARRIS COMPANY,
Respondents.

No. 229.

REPLY BRIEF FOR PETITIONER.

In the preparation of the petitioner's brief an earnest endeavor was made to eliminate all surplus matter and to state clearly in condensed form the ultimate facts of this case and the questions of law to be considered, and to present the argument and authorities in support of the petitioner's contention briefly and in logical sequence. This was done under a compelling sense of the obligation to conserve the time and energies of this Court. With full realization of this obligation this reply brief is submitted, not for the purpose of elaborating or reenforcing such brief, but solely for the purpose of pointing out a few of the fallacies in the respondent's argument, and replying to the questions raised for the first time in its brief filed herein and not presented by the record.

PART I.**POINT I.**

In this cause the respondent represents all of the libellants in the so-called consolidated cause and may not now for the first time make its defense individual and separate.

Throughout its brief (notably at pp. 31-33, 49) the respondent seeks to disassociate itself from the other libellant in the consolidated libel, and to show that it never objected to the removal of the vessel from the petitioner's wharf and never consented to her remaining there. It seeks further to draw a distinction between the claims against the vessel and the claims against her cargo, insisting that the use of plaintiff's wharf was principally for the benefit of the claimants of the cargo, and that it was not such a claimant. Such effort is entirely without merit.

The intervention of John B. Harris Company is on its own behalf and on behalf of all the libellants in the consolidated cause. It is the representative of a class and has been so treated throughout this litigation. The appearance of Hunt, Hill & Betts, Esqs., before the Special Commissioner was "for John B. Harris Company, Intervenor, and the other libellants in the consolidated cause of *Joseph H. Davis* against the Steamship 'Poznan' " *et al.* (R., 42). They signed the Intervenor's notice of appeal (R., 141), its assignments of error (R., 144) and the stipulation as to the transcript of the record on appeal (R., 144) in the same capacity. To the same effect are the exceptions to the report of the Special Commissioner (R., 135-6). Furthermore in the stipulation of facts (R., 131-2) appears the following:

"Since the Polish-American Navigation Corporation and the Acme Operating Corporation proved not to be financially responsible, by an agreement entered into between all the consolidated libellants dated October 10, 1922, the hearing before Judge Lacomb was terminated after five of the consolidated libellants had proved claims aggregating approximately \$440,000. By such agreement, all the consolidated (fol. 173) libellants agreed that the recovery under the final decree on behalf of the libellants, who had proved their claims before the Commissioner, should be paid to the Trustees and distributed by the Trustees in accordance with the orders of a committee of six proctors selected by all the consolidated libellants acting pursuant to the agreement. The committee found the total claims of all the libellants to be approximately \$1,216,000, and up to date have ordered the payment of a dividend of 17 per cent of each libellant's claim as finally allowed by the committee. After payment of this dividend, the balance remaining in the hands of the trustee is approximately \$38,000 of which \$20,000 is agreed to be held to secure the claim of the New York Dock Company in accordance with stipulation dated November 25, 1922."

And at no stage of the proceedings was there any effort to divide the libellants in the consolidated cause into cargo claimants and claimants against the vessel, and there is no warrant for doing so now. The cargo was in possession of the vessel, not of her owner or charterer. All the claims were against the vessel, either for possession of the cargo or for damages. For the purposes of this suit it is immaterial which of these libellants was responsible for the vessel's use of the petitioner's wharf. All are bound by the conduct of each so far as the order of January 5, 1921 (R., 36 and 37) and this

hearing are concerned. The arrest of the vessel was necessary whether the libel was to recover damages for breach of contract of affreightment, or for possession of cargo, and the just and reasonable value of such use is a legitimate charge against or a maritime lien upon the vessel and her proceeds.

POINT II.

The amount of the petitioner's recovery in the District Court should be accepted by this Court.

The questions of the fair and reasonable value of the use of the petitioner's wharf and the amount it was entitled to recover for such use, were fairly and fully tried before the Special Commissioner (R., 42-132), who reported such value to be \$250 per day with certain additions for incidentals (R., 132). To this the respondent excepted (R., 135). Its exceptions were overruled and final decree entered accordingly by the District Court (R., 137-140). The respondent appealed to the Circuit Court of Appeals and assigned as error the excessive amount of the recovery (R., 142, Sixth and Seventh assignments). The Circuit Court of Appeals, in its opinion covering more than twenty pages of the record (R., 145-166) did not question the reasonableness of the recovery, but denied any recovery on other grounds. Notwithstanding this, the respondent throughout its brief has used such expressions as "exorbitant claim for wharfage" (p. 12) "enormous claim for wharfage" (p. 36), "mulcted with a large sum for wharfage" (p. 59), and seeks to try again in this Court the question of what is the fair and reasonable value of the use of the petitioner's property.

It is respectfully submitted that this Court should accept as the fair and reasonable value of the use of the

petitioner's wharf the amount found below. If, however, this Court should deem it proper to do otherwise, then, we respectfully submit that the findings of the Special Commissioner and the District Court are abundantly sustained by the stipulated facts (R., 8-37, 131) the testimony of the witnesses and the documentary evidence (R., 42-132).

POINT III.

The discussion of the St. Paul case in respondent's brief is misleading.

Attempting to distinguish the *St. Paul* case from the case at bar, the respondent at page 43 of its brief says that the right of the petitioner to resort to the proceeds of the *Poznan* to satisfy its claim for wharfage is precisely the one

"which was not disputed or litigated in *The St. Paul*, where the Court and all the parties were in agreement that wharfage as one of the discharging expenses, was to be paid out of the fund in Court and was to have priority."

This statement is not in accordance with the facts. The wharfage in dispute in that case was the wharfage which accrued after the cargo was discharged, and which the Court had refused to allow as a charge against the cargo. The precise question litigated and decided was whether this claim for wharfage should be allowed as a charge against the proceeds of the vessel. The Court and the parties were not in agreement. The Hudson Navigation Co., the appellant, was asserting a claim against such proceeds through the marshal's bill of costs. The appellee was resisting such claim. The Circuit Court of Appeals al-

lowed it, not as a part of the marshal's bill, but as a claim against the vessel and her proceeds.

Furthermore the respondent on page 44 incorrectly asserts that the *St. Paul* case is direct authority for allowing the petitioner only \$29.49 a day, because the *Poznan* was later berthed somewhere at that cost. This same argument was made in the District Court and was disposed of in the opinion of Judge AUGUSTUS N. HAND, as follows (R. 138) :

"This is not a sound argument against the wharfinger. It was not the latter's fault that the ship was not removed from the pier in question. The cargo owners opposed a motion of the owner and the charterer of the ship to remove her. The question is not whether some other pier was better. The ship was at the libellant's pier and the cargo owners kept her there. They received the benefit of shelter and discharge from the use of libellant's property. I can conceive of no reasonable measure of this benefit except the reasonable value of the particular wharfage enjoyed and the incidental services rendered. *There was no duty upon the wharfinger as in The St. Paul, 271 Fed. 265, to remove the ship to a less expensive place.*" (Italics ours.)

POINT IV.

The New York State Wharfage Statute is not now available to the respondent as a defense or as evidence of the value of the use of petitioner's property.

The respondent at page 57 of its brief undertakes to set up the New York State Wharfage Statute (Greater New York Charter, Section 859) as a bar to the recovery

of wharfage by the petitioner at a greater rate than \$29.49 per day. Such defense was not relied upon in either of the courts below. Failure to so limit the petitioner's recovery was not assigned as error on the appeal and there is nothing in the record to show that the question was raised in either court. As the case is to be heard in this Court on the record in the Circuit Court of Appeals, it is respectfully submitted that this question should not be raised here for the first time.

The respondent should not be allowed to offer this statute here as evidence of what is the just and reasonable value of the use of the petitioner's property, because there has been no order of the Court permitting such addition to the record and because the petitioner has had no notice of the purpose to offer such evidence or opportunity to offer further evidence of such value.

The District Court found that the fair and reasonable value of the use of petitioner's wharf by the vessel was \$250 per day and this finding was not disturbed by the Circuit Court of Appeals. If the petitioner may not recover the contract price for the use of its property, still under the maritime law, it is entitled to recover just and reasonable value of such use. *Ex parte Easton*, 95 U. S. 68, 73. This is the only rule known to the maritime law, and the libel in this case being *in rem*, the Court can apply no other measure. It is inconceivable that on the evidence in the record any court could find \$29.49 a day to be the just and reasonable value of the use of shedded pier 494 feet long and 70 feet wide in the harbor of New York (R. 44) at the end of 1920 and the beginning of 1921, when there shipping was still congested as a result of the war.

To ask that the petitioner be awarded only \$29.49 per day for the use of its privately owned property when the

just and reasonable value of such use has already been found by a court of competent jurisdiction to be \$250, is to ask that the Fifth Amendment and the first section of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 6 of the Constitution of the State of New York be all violated, and such fundamental law is here invoked as a protection against such award.

Therefore the petitioner respectfully submits that the respondent should not be heard in this Court for the first time to plead the New York State wharfage statute as a bar to the petitioner's recovery of the just and reasonable value of the use of its property or to use it as evidence of what such value is.

However, if the Court should decide to consider said statute in any aspect, then the petitioner respectfully asks that consideration be given to the authorities cited and the arguments presented in the following Part II of this reply brief.

PART II.

SECTIONS 859 AND 863 OF THE GREATER NEW YORK CHARTER HAVE NO APPLICATION TO THE PETITIONER'S PIER NO. 6 IN ANY EVENT, BECAUSE THESE SECTIONS AND THEIR EVERY PREDECESSOR SINCE 1784 WERE ENACTED WITH SOLE REFERENCE TO PUBLIC WHARVES, MEANING THEREBY WHARVES WHICH THE PUBLIC HAS THE RIGHT TO USE, AND WERE NEVER INTENDED TO APPLY TO PRIVATE WHARVES, MEANING THEREBY WHARVES WHICH ARE PRIVATE PROPERTY AND WHICH NO ONE MAY USE EXCEPT BY THE PERMISSION OF THE OWNER, —SUCH AS ADMITTEDLY IS THE WHARF INVOLVED IN THIS CAUSE.

POINT I.

Construed as an attempt to limit the right of recovery against a vessel under a maritime contract, Section 859 of the Greater New York Charter, is in conflict with Article III, Section 2 and Article I, Section 8, of the Constitution of the United States as an invasion of the admiralty and maritime jurisdiction, and therefore invalid.

The case of the *M. L. C. No. 10*, C. C. A. 2, 699, cited by respondent on page 56 of its brief is not in point. The controlling consideration in the decision of that case was the fact that the wharf, though privately owned, was devoted to the use of the public, and that the owner had "invited all and sundry to come," and that therefore it was so far a public wharf that the state might regulate

the rates of charge. There is nothing in the record to show that petitioner's pier No. 6 was devoted to the use of the public or was in any sense a public pier. The *Poznan* came to this pier in the usual way, under contract with the owner of the pier. The invalidity of Section 859 of the Greater New York Charter as an invasion of the admiralty and maritime jurisdiction was not passed upon by the Court in that case.

The case of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, is decisive of this point. In that case the Court quotes Mr. Justice BRADLEY, delivering the opinion of the Court in *The Lottawanna*, 21 Wall. 558, as follows:

"That we have a maritime law of our own operative throughout the United States, cannot be doubted . . . the Constitution must have referred to a system of law coextensive with, and operating uniformly in the whole country. It certainly could not have intended to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed in all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

Following this interpretation of the Constitutional grant of the admiralty and maritime jurisdiction, this Court held the New York State Workmen's Compensation Act invalid as affecting the right of recovery for the death of a stevedore, at the time engaged in a maritime service.

This case has been cited and followed by this Court numerous times, notably in *Steamship Bowdoin Co. v. Industrial Accident Commission*, 246 U. S. 648; *Chelentis v. Luckenbach S. S. Co.*, 217 U. S. 372; *Union Fish Co. v. Erickson*, 248 U. S. 308; *Coon v. Kennedy*, 248 U. S. 457;

Peters v. Veasey, 251 U. S. 121; *Knickerbocker Ice Co. v. Stewart*, 253 U. S., 149; *Osaka Shosen Kaisha v. Lumber Co.*, 260 U. S. 490; *Great Lakes Co. v. Kierejewski*, 261 U. S. 479; *Washington v. Dawson*, 261 U. S. 219; *Robins Dry Dock Co. v. Dahl*, 266 U. S. 449. The rule there laid down has not been departed from.

"* * * the Constitution adopted the law of the sea as the measure of maritime rights and obligations."

Washington v. Dawson, 261 U. S. 219, 228;
The Constitution, Art. III, Sec. 2; Art. I, Sec. 8.

The "rights and obligations" of the parties arising either under a maritime contract or from a maritime tort, are exclusively within the admiralty and maritime jurisdiction, and cannot be "enlarged or impaired" by state statute or common law rule. State statutes have been held invalid as attempts (1) to create a lien for repairs to a vessel in a foreign port (*The Roanoke*, 189 U. S. 185); (2) to apply workmen's compensation under the contract of a seaman (*Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372); (3) to apply workmen's compensation under the contract of a stevedore (*Southern Pacific Co. v. Jensen*, 211 U. S. 205); (4) to limit the time in which recovery may be had (*The Key City*, 14 Wall. 653); (5) to allow interest in a general average adjustment (*The New Zealand Ins. Co. v. Earnmoor S. S. Co.*, 79 Fed. 368); (6) to require a contract to be in writing (*Union Fish Co. v. Erickson*, 248 U. S. 308); (7) to define liability under a maritime contract of affreightment (*Osaka Shosen Kaisha v. Lumber Co.*, 260 U. S. 490); (8) to provide for recovery of a penalty instead of actual damages (*Watts v. Camors*, 10 Fed. 145); (9) to prescribe rules of navigation (*The Steamboat New York v. Rea*, 18 How. 223); (10) to create

priority in the payment of claims (*The J. E. Rumbell*, 148 U. S. 1); (11) to exempt a municipality from liability for injury inflicted by its fire-boat (*Workman v. New York*, 179 U. S. 552); (12) to prescribe the manner of the presentation and proof of claims (*Rodgers v. The City of New York*, 285 Fed. 362).

Since the decision in *Southern Pacific Co. v. Jensen* it has only remained for this Court to apply the rule there laid down. In *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469), a state workmen's compensation act was held applicable in the case of a carpenter working on an unfinished ship lying in navigable water, because the contract for the construction of the vessel was non-maritime and his activities had "no direct relation to navigation or commerce." So, too, in *Millers' Indemnity Underwriters v. Boudreaux*, decided by this Court, February 15, 1926, state workmen's compensation was upheld where a diver was drowned while sawing off a submerged pile, because the act was of "mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law."

Wharfage, the subject of the instant suit, is essentially maritime. It can accrue only upon the rendition of a service to or the conferring of a benefit upon a vessel in the regular course of navigation and maritime commerce.

"These remarks are sufficient to show that wharves, piers and landing places are well nigh as essential to commerce as ships and vessels, and are abundantly sufficient to demonstrate that the contract for wharfage is a maritime contract."

Ex Parte Easton, 95 U. S. 68, 75.

What are the rights and obligations of the parties to a contract for wharfage as measured by the law of the sea?

This Court has given the following answer:

"Compensation for wharfage may be claimed upon either an express or an implied contract, according to the circumstances. Where a price is agreed upon for the use of the wharf, the contract furnishes the measure of compensation; and when the wharf is used without any such agreement, the contract is implied, and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred."

Ex Parte Easton, 95 U. S. 68, 73.

Wharfage is not of merely local concern, as, for example, is the service of a carpenter on an unfinished vessel lying in navigable water (*Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469), or the service of a diver removing a submerged pile (*Millers' Indemnity Underwriters v. Boudreaux*, decided by this Court, February 15, 1926), but is a necessary incident to the operation of a vessel as the agency of maritime commerce. The *rule* by which it is to be *measured* is a characteristic feature of the general maritime law and is of vital concern to such commerce generally. The wharves are local, as were the unfinished vessel and the submerged pile, but the *measure* of liability for their use by a vessel is general and must be *uniform*. The exigencies of navigation are such that it is not always possible to bargain for the rate of compensation to be paid for wharfage, and it is of prime importance for vessels everywhere to know that in the absence of an express agreement they shall be liable for and only for the just and reasonable value of the use of the property and the benefit conferred, and that a court of admiralty has the exclusive jurisdiction to determine what is just and reasonable in any given instance. In no other way can the uniformity contemplated by the Constitution

be secured in an incident of maritime commerce well nigh as essential as vessels themselves.

The principle as above stated has been applied to the subject of wharfage by the highest Court of the State of New York. In *Brookman v. Hamill*, 43 N. Y. 554, the Court of Appeals held invalid a state statute creating a lien for wharfage on the ground that it is maritime in its nature, giving rise to a lien under the maritime law, and is exclusively within the admiralty and maritime jurisdiction. This case was cited as authority by this Court in *Edwards v. Elliott*, 21 Wall. 532, 557. Furthermore, the Legislature of New York has acknowledged its lack of power to vary the liability of a vessel under a contract for wharfage, by amending the statute providing for liens on vessels so as to restrict it to cases where there "is not a lien by the maritime law" (New York Lien Law, Sections 80 and 81). *Obviously if the Legislature is thus without power to impose any liability on a vessel in rem, it has no power to limit her obligation when sued in rem in a court of admiralty.*

In what is said above we have not overlooked a line of decisions which may seem to, but do not, lead to a different conclusion (*Transportation Co. v. Parkersburg*, 107 U. S. 691; *Packet Co. v. Keokuk*, 95 U. S. 80; *Packet Co. v. St. Louis*, 100 U. S. 423; *Vicksburg v. Tobin*, 100 U. S. 430; *Packet Co. v. Caleettsburg*, 105 U. S. 559; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444; *Cannon v. New Orleans*, 20 Wall. 577; *Shively v. Bowlby*, 152 U. S. 1). In these decisions there is found language, more or less general, to the effect that wharves, being local in their nature, are under the jurisdiction and control of the states where located, in the absence of congressional legislation on the subject. However, on examination these cases will be found to be distinguishable from the suits at bar. In the

first place it will be seen that they are common law actions or suits in equity against the owners of vessels and were not admiralty proceedings *in rem*. In the second place it will be seen that the decisions are based on the commerce clause of the Constitution (Article I, Section 8, Clause 3) or on the Constitutional inhibition against tonnage duties (Article I, Section 10, Clause 3), and the question of the admiralty and maritime jurisdiction was not raised or passed upon. And it will be seen further that the wharves involved were not private wharves, as is the one involved in the instant suit, but were public wharves in the sense that the public had a right to use them, because the property was affected with a public interest, either by virtue of ownership or by virtue of their operation under a franchise granted by the state.

In *Transportation Co. v. Parkersburg* (*supra*) for example, the appeal was from a decree dismissing a bill in chancery on demurrer. The bill was for the recovery of wharfage already paid and for an injunction against the collection of wharfage in the future. The wharves were municipal property of the City of Parkersburg. They were public in the sense above stated. This Court held that the charge by the City for their use was not a regulation of interstate commerce or a duty of tonnage. The admiralty and maritime jurisdiction was not a point in the case. The Court emphasized the distinction between public and private wharves as follows:

"It is undoubtedly a general rule of law, in reference to all public wharves, that wharfage must be reasonable. A private wharf, that is, a wharf which the owner has constructed and reserves for his private use, is not subject to this rule; for, if any other person wishes to make use of it for a temporary purpose, the parties are at liberty to make their own bargain."

In *Cannon v. New Orleans*, *supra*, the question decided was whether a charge imposed on all steamers mooring or landing in the port of New Orleans was a duty of tonnage. It was held that it was, and that the City Ordinance imposing it was therefore invalid. The Court added:

"It is a doctrine too well settled, and a practice too common and too essential to the interests of commerce and navigation to admit of a doubt, that for the use of such structures (wharves), erected by *individual* enterprise, and recognized everywhere as private property, a reasonable compensation can be exacted. And it may be safely admitted also that it is within the power of the state to regulate this compensation, so as to prevent extortion, a power which is often very properly delegated to the local municipal authority."

In that case, the charge imposed being held to be a duty of tonnage, its reasonableness as wharfage and the right of the State to regulate it as such were not issues, and the above quotation was not necessary to its decision. The question of the admiralty and maritime jurisdiction was not raised.

In *Shively v. Bowlby*, *supra*, it was merely held that the tenure of shore property is governed by the law of the state where located, and that title to land under water and between high and low water mark is in the state until it is granted to another owner. The decision is not in point in the instant case, since the petitioner has succeeded to whatever title the state had to the land on which its pier is built.

The admiralty and maritime jurisdiction of the Federal courts is granted by the Constitution and cannot be limited or delegated to the States by congressional action (*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149). It is

broader than and entirely independent of the constitutional grant to Congress of the right to regulate interstate and foreign commerce. In *The Belfast*, 7 Wall. 624, 640, Mr. Justice CLIFFORD, delivering the opinion of the Court said:

"Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely different things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants."

The foregoing was quoted with approval in *In re Garnett*, 141 U. S. 1, 12, where the Court added:

"It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends."

It follows, therefore, that if commerce is *maritime*, whether interstate or intrastate, the State has no power to limit the rights and obligations of the parties engaged therein, although Congress has not undertaken to deal with the particular subject involved. The commerce involved in the instant suit is essentially maritime. Wharfage, the subject of the suits, is a necessary incident of *maritime* commerce alone, and by virtue of the *maritime* nature of such commerce is beyond the reach of State legislation, even though Congress has not dealt with the subject.

In the following point it will be shown that Section 859 of the Greater New York Charter is not a prohibitive statute and is inapplicable to petitioner's pier No. 6.

POINT II.

The statutes under consideration are applicable to public wharves only.

That the statutes under consideration are applicable only to wharves which the public has the *right* to use, that is, to *public* wharves, was decided in *Murphy v. Voorhis*, 10 Daly 457, cited by the court in *The Allan Wilde*, 264 Fed. 291. That was a suit to recover the statutory penalty of treble damages for exacting and receiving more than the statutory rates of wharfage at a wharf in the City of New York. The charge complained of was "three dollars per day as dockage for a canal boat *lying and unloading at the bulkhead.*" The plaintiff was denied a recovery on the ground that he had not shown that the bulkhead in suit was one of the class of bulkheads to which the act of the legislature was applicable; that is, on the ground that the plaintiff had offered no evidence to show "*that the upland was a highway, or that he was entitled to pass over it without the defendant's permission for the purpose of reaching the bulkhead.*" The Court held that unless the plaintiff proved that he had the *right* to use the wharf without permission of the owner, that is, unless it was a *public* wharf, the statute did not apply. It is a clear recognition of the two classes of wharves as described above and a holding that these statutes only apply to *public* wharves, that is, to such as a person has the *right* to use as he does a highway, and does *not* apply to *private* wharves, that is, to those that a person cannot lawfully use without *permission* of the owner.

The petitioner's pier, No. 6, is not a public wharve within the meaning of this decision, but is private, and no one may use it for any purpose whatever except by permission or license from the owner.

POINT III.

The libellants' wharves are not public but are private wharves.

It is conceded that the petitioner's pier No. 6 is privately owned, and there is no evidence that its use was ever granted to the public. From the record the contrary clearly appears. The Brooklyn waterfront, where the petitioner's pier is located, has been developed under the riparian rights of the upland owners. Among these rights is the right to build piers out to the navigable part of the river, subject to the superior right of the public to navigate the stream. A different rule was applied in one case to land on the Hudson River in Columbia County, but the decision in that case was discredited and expressly overruled (*Rumsey v. N. Y. & N. E. R. R. Co.*, 133 N. Y. 79).

It is true that at an early date the Crown granted to the City of New York the land between high and low water mark on this part of the Long Island shore; but the upland owners first leased the interest of the City in this tideway for a small rental and later secured such interest in fee. The State established bulkhead lines and permitted these upland owners to fill in land under water and build piers and wharves beyond low water mark. The effect of this was to extend the upland as private property. There was no requirement that such extension should be open to the public.

A pier thus erected there is private property in the fullest sense, and no one may use it except by permission of the owner. This was decided in *Wetmore v. Atlantic White Lead Co.*, 37 Barb. 70, which was followed in *Wetmore v. Brooklyn Gas Light Co.*, 42 N. Y. 384, where the Court said:

"The public never had any right of landing upon these lands of the defendant, or of crossing or in any way using the same for any purpose. *The public right upon the Brooklyn side was confined to that of navigating the river.* How the right of navigation should confer upon the plaintiff any right to use these lands, it is difficult to discover. * * * He can enjoy his right to navigate the river in as free and ample a manner as before (the erection of the wharf). *He had no right to unload or load his vessels at this place before and he has none now.*"

As an incident to the private ownership of such piers, the owners may charge and receive whatever rate of wharfage they may agree upon with their customers. Lord HALE, in his treatise *De Portibus Maris*, laid it down as the law that a riparian owner for his own private advantage might set up a wharf and take whatever rates his customers would pay, because he would be doing "no more than is lawful for any man to do, viz., make the most of his own." And this is still the law (*Dutton v. Strong*, 66 U. S. 23, 1 Black 23; *Louisville, etc., R. R. Co. v. West Coast Co.*, 198 U. S. 483; *Weems Steamboat Co. v. People's Steamboat Co.*, 214 U. S. 345; *The Allan Wilde*, 264 Fed. 291).

On Manhattan Island, owing to a tenure of the shore peculiar to that locality, an entirely different rule obtains. The upland owners have no riparian rights. As such they have no right to build wharves or collect wharfage. No one has the right to collect wharfage there except as a franchise granted by statute. All the wharves are *public* wharves, in the sense that the streets of the city are, which the public has the *right* to use, except in so far as such right has been limited by statute. It was with sole reference to such wharves that the statutes un-

der consideration were passed, and as decided in *Murphy v. Voorhis, supra*, to such wharves only are the statutes applicable. This becomes more evident when the tenure of the Manhattan water front and the history and purpose of the statutes are considered.

POINT IV.

Section 859 of the Greater New York Charter is wholly inapplicable to wharfage at private wharves such as the libellants' wharves are.

This becomes evident upon consideration of (1) the tenure of waterfront property in Manhattan, (2) the language of the statutes, (3) its origin and purpose, (4) its effects and consequences, and (5) the practical construction placed on this and kindred statutes.

1.

The Tenure of Waterfront Property on Manhattan.

By the Dongan charter of 1686 and the Montgomerie charter of 1730 the Crown granted to the City of New York the land on Manhattan Island between high and low water mark and the land under water for four hundred feet beyond low water mark, with full power to erect wharves and collect wharfage. As a result the owners of the upland were left without any riparian rights, and the waterfront was developed by the City itself or by its direction, or under grants from the City by authority of the Legislature. It is useless now to inquire by what authority the upland owners were deprived of their common law right of access to the navigable parts of the rivers around the island. It is sufficient to know that it was an accomplished fact.

In 1857, in *Hecker v. New York Balance Dock Co.*, 24 Barb. 215, this subject was thoroughly investigated and ably argued by no less eminent counsel than David Dudley Field for the plaintiffs and Samuel J. Tilden for the defendants, the value of whose labors was acknowledged in the Court's opinion. In delivering the opinion of the Court, Justice DAVIES said:

"These grants have been held by the highest court in this state as vesting the absolute ownership of the soil under water from high water mark, to 400 feet beyond low water mark, in the corporation, with full power to sell the same, and to make and erect streets thereon, without the consent of the owner of the adjoining land at high water mark, and thereby entirely excluding and cutting him off from access to the water."

In that case the Court followed *Furman v. The City of New York*, 5 Sandf. 16, which was affirmed by the Court of Appeals (10 N. Y. 567).

Justice DAVIES then gave a synopsis of the legislative authority under which the waterfront was developed. The principal features of the plan adopted by the City under such authority (Act of 1798) were a marginal street between which and the river no buildings of any kind could be erected except piers and bridges as approaches to them. In some instances these piers and bridges were built by the City; others were required to be erected by the owners of the lots opposite, and, upon their failure to do so, by the City at the owners' expense or by such persons as the City might grant the privilege of doing so. The dominant purpose throughout the whole plan was to make the piers and wharves public and to protect the right of the public to use them as they did the streets of the City. The Legislature made it lawful for those erect-

ing or leasing such piers to collect wharfage at certain rates. It follows, therefore, that the right to collect any wharfage for the use of these piers was due solely to the Legislative grant or franchise, and not by virtue of ownership of the property.

In *Taylor v. Atlantic Mutual Insurance Co.*, 37 N. Y. 275 (decided in 1867), the Court said:

"These wharves and piers are streets of the City of New York, for the free passage of all citizens, and are so declared by statute. The only revenues authorized to be derived therefrom are the wharfage, already referred to, (*i. e.*, that authorized by the statute), and the charge authorized to be made by the third section of the act of 1860, already adverted to (*i. e.*, top wharfage)."

The *right* of the public to use these Manhattan piers and wharves was jealously guarded. When title to land under water was granted to a private individual, this right was carefully protected. The grantees of land under water were required to covenant that the piers and wharves erected thereon should be *forever maintained as public streets and highways*. On the Brooklyn waterfront, the public had no such rights; and consequently it will be noted that no such reservation is to be found in the grants of land under water in Brooklyn, one of which is printed in the Record (fols. 331-345).

In *Langdon v. The Mayor, etc., of New York*, 93 N. Y. 129, such a grant to John Jacob Astor was involved and it contained such a covenant. In this case (decided in 1883) Judge EARL, delivering the opinion of the Court, gives a comprehensive and most enlightening historical review of the legislative authority under which the Manhattan waterfront was developed and of the rights acquired by the grantees or lessees of the piers and wharves

built pursuant thereto. It was held that the right to wharfage was by virtue of the legislative grant but was property and could not be taken or destroyed without compensation.

Again, in 1888 in *Kingsland v. The Mayor, etc., of New York*, 110 N. Y. 569, this subject was again ably argued and carefully considered. The Court in an exhaustive opinion delivered by Judge FINCH held that upon the taking or destruction of the right to wharfage granted by the City to the owner, the subject to be valued was an

" * * * incorporeal right which can only exist by force of the law and under its shelter (*Langdon v. Mayor, etc., supra*) and can never be more than that the law creates or sanctions."

As commerce increased and it became convenient for certain boat lines to have regular places for landing on the Manhattan shores of the Hudson and East Rivers, Chapter 261 of the Laws of 1858 was enacted. This act provided that when the "owners of any wharves or slips" on the North or East Rivers in the City of New York, should lease the same to certain regular lines of steam-boats, "the wharves and slips so leased shall, during the term of the lease, be kept and reserved for the exclusive use and occupancy of the steamboats of the lessees *to the extent necessary for the conducting and doing of the business in which they are engaged.*" The act then expressly provides to what extent the use of such wharf or slip is thus curtailed. Except as thus limited, the public might still use them. See *Commissioners of Pilots v. Clark*, 33 N. Y. 251.

When the lessees of these Manhattan piers began to build sheds to protect the merchandise deposited on them, there was protest on the ground that such sheds interfered

with the free use of the piers by the public, and such sheds were declared unlawful. In *People v. Mallory*, 46 How. Pr. 281, after referring to the various statutes on the subject, the Court said:

"All these are expressions of the legislative intent that the wharves and piers should not be encumbered, the design being to give to and preserve for them the character of highways—to make them part of the public streets."

There are references in the reports to both *public* and *private* wharves on Manhattan, but this was to distinguish those *owned* outright by the City from those that were *owned* by private individuals. As far as is known all were *public* in the sense that the public had the right to use them as streets. (*Hecker v. New York Balance Dock Co.*, 24 Barb. 215; *Vandewater v. The City of New York*, 2 Sandf. 258.) Some were private property in all respects, with the exception that the public had the *right* to use them unless restricted by the legislature, and the further exception that the owners had *no right* to collect wharfage for their use by the public except to the extent made lawful by the legislature. And this makes intelligible the language of the statute under consideration. It confers this right.

2.

The Language of the Statute.

The language of the statute is that "it shall be lawful to charge and receive, within the City of New York, wharfage and dockage from every vessel" at certain rates. The language is the grant of a privilege or franchise and nothing more. It is an enabling statute. It contains no words of restriction or prohibition. It "con-

fers a right" (*The Antonio Zambrana*, 88 Fed. 546), but it does not make unlawful the exercise of any existing right. It confers no right that the owner of a private wharf does not already have at common law, nor does it abridge his common law rights in any respect. The words "that it shall and may be lawful" are permissive and not peremptory. *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 84, 91.

The language of this statute has remained practically the same since it was first enacted in 1781 (Revised Laws 1792, ch. 32) in the following words:

"Be it therefore enacted, etc. That it shall and may be lawful to and for the present owners and proprietors of the said mentioned wharfs, or the owners or proprietors thereof for the time being, to ask, demand, take and receive to and for their several and respective uses * * *. For each ship or other vessel, of the burthen of sixty tons, and under the burthen of one hundred tons, at and after the rate of three shillings per day * * *."

The language of this statute as originally enacted and as it now stands, is wholly unlike the language usually employed when it is the purpose of the legislature to fix or regulate the rates to be charged the public for the services of private persons or the use of private property.

Standing alone it means nothing to the owner of a private wharf, who has always had the right to charge what he pleased. If, however, it is read in connection with Section 863 of the Greater New York Charter, which provides for the recovery of treble damages by one who pays more than the rates named, it is not only in derogation of the common law but is also highly penal, and must be strictly construed.

"§863. It shall be the duty of every person owning or having charge of any pier, wharf, bulkhead, or slip in the city of New York, to cause to be printed on the backs of all bills, presented by them for wharfage, section eight hundred and fifty-nine of this act, and the owner, consignee, or person in charge of any vessel shall not be required to pay the wharfage or dockage due on such vessel, unless upon his demand the bill printed in conformity with this section is presented to him. Any person owning or having charge of any pier, wharf, bulkhead, or slip as aforesaid, who shall receive for wharfage any rates in excess of those now authorized by law, shall forfeit to the party aggrieved, treble the amount so charged as damages, to be used for and recovered by the party aggrieved."

It will not be presumed, if the statute will bear any other construction, that the legislature intended to subject a man to treble damages for the exercise of a common law right which has not been prohibited and which is not injurious to the public. This is fully borne out by the origin and purpose of the statute.

3.

Origin and Purpose of the Statute.

The present statute (Section 859 of Greater New York Charter) is a lineal descendant of an act passed on the 17th day of April, 1784, at the seventh session of the legislature in practically the same language. The preamble to that act was as follows:

"Whereas it hath been found by experience, that the wharfs fronting the East and Hudson Rivers in the City of New York, have conduced to the increase and advantage of trade and navigation to

and from the said City, in the lading and unlading of ships and other vessels: and for as much as the owners and proprietors thereof have been at a very great expense, not only in the making, erecting, and building, but also in maintaining and keeping the same from time to time in good and sufficient repair, to answer the purposes aforesaid. Be it therefore enacted, etc."

In the beginning and for nearly a century its application was restricted to Manhattan. It originated as a part of the general plan for developing the Manhattan waterfront, growing out of the fact that the City of New York held title to the land between high and low water mark and four hundred feet beyond low water mark and the upland owners had *no right* to erect wharves, but were compelled by law to do so and to maintain them for the use of the public. The purpose of the act is obvious. It was the grant of a franchise to collect wharfage from the public as compensation for a service rendered the public, and to encourage the development of the waterfront. This is clearly apparent from the preamble to the act.

In *Thompson v. The Mayor etc., of New York*, 11 N. Y. 115, 121, the Court said:

"The ground upon which the state allowed piers to be made upon the outside of South street was not that individuals might be benefited, but because the public required it. They gave the privilege to the proprietors of the adjoining lots in the first instance, not on the ground of any right in them, but in the exercise of a spirit of fairness and equity, and of a just liberality on the part of the sovereign authority towards the citizens."

Such preamble and act would be absurd if applied to land where the owner in fee had an existing right to build a store or wharf and collect any amount of rent or

wharfage he chose. Such application would result in disastrous effects and consequences.

4.

Effects and Consequences of the Statute.

Construed as the grant of a special privilege or franchise to collect wharfage where no such right existed before, instead of a limitation upon an existing right, the act undoubtedly tended and still tends to accomplish its evident purpose of developing and keeping in proper repair the wharfage facilities in the City of New York. Construed as now contended for by the respondent it would have exactly the opposite effect. It would restrict the rights of private property and depreciate its value. It would give publicly owned wharves an unfair advantage over privately owned wharves. The wharves owned by the city are free from tax, while those that are privately owned are heavily taxed. Hence the city can do business at the statutory rates, but it does not follow for a moment that private owners can.

The construction now contended for by the respondent would thus make the penal feature of the law (Greater New York Charter, Section 863) exceedingly unjust and oppressive, if not unconstitutional. It would subject the owner of private property to treble damages for receiving what might be, and in this case has been found to be fair and reasonable value of its use.

5.

The Practical Construction Placed on this and Kindred Statutes.

Through a long period of years these statutes have been construed as inapplicable to private wharves. The own-

ers of private wharves have habitually charged and received whatever rates they and their customers agreed upon. Even in the absence of an agreement, it cannot be disputed that they may recover the fair and reasonable value of the use of their property. (*Ex parte Easton*, 95 U. S. 68).

Section 859 of the city charter, providing for the rates of wharfage, is only one feature of the statutory regulation of wharves, piers, bulkheads and slips in the City of New York. There is no reason why it should be more applicable to the petitioner's pier No. 6 than other sections where the language is equally broad. Take, for example, Section 849, which provides:

"Whenever any pier, wharf, or bulkhead in The City of New York shall be incumbered or obstructed in its free use by merchandise, or any material not fixed to such pier, wharf, or bulkhead, the commissioner of docks is hereby authorized to require the owner, consignee or person in charge of such merchandise or material, to remove the same without any unnecessary delay"

This language, were it given the construction which the respondent attempts to impose on Section 859, would embrace the petitioner's pier, but it will not be contended that the commissioner of docks exercises or claims such authority as to it. There is no "free use" of a private pier. This section has the same parentage as Section 859, and was never intended to apply to any except public piers and is not so construed in practice. The same is true of Sections 851 and 852, where the language is equally broad and inclusive and which provides for the removal, and, if necessary, the sale of merchandise encumbering the "free use," of "any pier, or bulkhead or marginal street, wharf or place in The City of New York

* * * without authority of law." Section 853 provides that the proceeds of the sale of such property, if not claimed in twelve months, shall be paid over to the Commissioners of the Sinking Fund.

The kindred Section 862 provides:

"It shall be lawful for the owners or lessees of any pier, wharf, or bulkhead within the City of New York, to charge and collect the sum of five cents per ton on all goods, merchandise, and materials remaining on the pier, wharf or bulkhead owned or leased by him, for every day after the expiration of twenty-four hours" (after their arrival).

Apparently only two efforts have been made to apply this statute to private wharves. The first was in *Woodruff v. Havemeyer*, 106 N. Y. 129, and the second was in *International Hide Co. v. New York Dock Co.*, 93 App. Div. 562. In each case the effort was unsuccessful. In the first case the Court intimates that the statute is applicable only to "public wharves in New York and Brooklyn," and could not be construed to "prohibit the owner of a *private wharf*" from making such contract as he pleased with his customer, nor could it be construed as requiring him to store goods for any period of time without compensation. Both of these cases are cited with approval by this Court in *The Allan Wilde* case.

The most recent practical construction placed on the statute under consideration (Section 859) is the resolution of the Commissioners of the Sinking Fund, establishing the rates pursuant to Chapter 477 of the Laws of 1923. This resolution which in terms applies to "any, pier, wharf, or bulkhead within said City" (of New York), provides that:

"Wharfage for vessels using the deck of the pier, accrues from the day the berth is reserved for the vessel as specified in the *application approved by the Department* until the expiration of the day of the last cargo is removed." (Italics ours.)

The "Department" here referred to is, of course, the Department of Docks of the City of New York, to which application for approval is made only in the case of *public* wharves. It never occurs to any one to ask its permission to use a private pier such as is the petitioner's pier No. 6.

It follows, therefore, that the statute under consideration was originally applicable only to Manhattan, where all of the wharves were *public*, and for nearly a century could not possibly have applied to any other kind. The only reason that might be assigned for contending that it now applies to petitioner's wharves is that in 1860 (Laws 1860, Chapter 254) the Legislature amended the law so as to make it applicable to the then City of Brooklyn, and that upon the creation of Greater New York, the City of Brooklyn became a part of the City of New York and is governed by the Greater New York Charter.

But this reason is not sufficient. The extension of the statute to include Brooklyn was a territorial extension only. The words of the statute were otherwise the same and its character as the grant of a privilege or franchise remained unchanged. It never had applied to *private* wharves in the sense that the petitioner's wharves are, and the extension of its territorial scope can certainly not have the effect of changing the settled meaning of its words. If there had been no wharves in Brooklyn except private wharves, as here defined, when that city was included in the terms of the act, there might be a semblance of support for the respondent's contention;

but there were then public wharves or landing places there. See *People v. Lambier*, 5 Denio 9, and *Wetmore v. The Atlantic White Lead Co.*, *supra*.

Therefore, after the territorial extension of the statute to Brooklyn it became effective without being applicable to private wharves. The statute is still the grant of a privilege. It is applicable to those who can take under the grant. It is inapplicable to the petitioner, because, as the owner of private piers it already had all the rights the statute granted, and more, and it took nothing under the grant.

This difference between the property right in waterfront property on Manhattan and in Brooklyn has been recognized by the courts. It is referred to in *Wetmore v. Brooklyn Gas Light Co.*, *supra*.

In *Downes v. Elmira Bridge Co.*, 41 App. Div. 339, 340, referring to property of the Brooklyn Wharf and Warehouse Company on East River in the Borough of Brooklyn, in 1901 it is said:

"The wharf and the property adjacent were used in connection with piers for the purpose of unloading merchandise from vessels and the delivery of merchandise thereto for shipment. In normal condition this property, wharf and piers, was used by the general public for the purpose of the business usually carried on at such places. The property, however was *private*, and the *right* of the public therein was as licensees. (*Wetmore v. The Atlantic White Lead Co.*, 37 Barb. 70; *Wetmore v. The Brooklyn Gas Light Co.*, 42 N. Y. 384.) *In this respect the character of the public right is somewhat different from that which obtained in the City of New York, where the docks partake of the character of a public street.* (*Delaney v. Pennsylvania R. R. Co.*, 78 Hun, 393.)" (Italics ours.)

A very recent article by Winthrop Taylor, in *The Cornell Law Quarterly* (Vol. X, p. 303, April, 1925) on "The Seashore and the People," written with special reference to the tenure of shore property on Long Island, is in harmony with the above cases, and the difference between the tenure on Long Island and on Manhattan is pointed out (p. 321 note).

It therefore appears that the words, "Pier, wharf, or bulkhead," as used in the statute have acquired a well defined historical and judicial meaning; that nothing has transpired to change this meaning, and that this meaning restricts the statute to such wharves, piers, bulkheads and slips as are public in the sense that highways and streets are public. Such was the decision in *Murphy v. Voorhis, supra*.

POINT V.

A wharf is public only when the public has the right to use it; use by license merely is not sufficient.

The interpretation placed on this statute in *Murphy v. Voorhis, supra*, is undoubtedly correct. From the earliest times the statutory regulation of wharfage rates has been limited to *public* wharves; that is, wharves which the public has a *right* to use. In his treatise *De Portibus Maris* Lord HALE laid it down as the law that a man for his own private advantage might set up a wharf and take whatever rates his customers would pay, because he would be doing "no more than is lawful for any man to do, viz., make the most of his own"; but that "if the king or subject have a *public* wharf," the rates must be "reasonable and moderate." And he likened the interest

which the public has in such a wharf to the interest it has in a "street."

So in *Dutton v. Strong*, 66 U. S. 23, 32 (1 Black 23), the Supreme Court has said:

"Piers or landing places, and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner; or, in other words, the owner may have the right to the exclusive enjoyment of the structure and to exclude all other persons from its use; or he may be *under obligation* to concede to others the privilege of landing their goods, or of mooring their vessels there, upon the payment of a *reasonable* compensation as wharfage"

In *Louisville, etc., R. R. Co. v. West Coast Co.*, 198 U. S. 483, the necessity for the existence of the *right* on the part of the public to use a privately owned wharf so as to destroy its character as a private wharf is emphasized. The defendant erected a wharf at the foot of a public street in the City of Pensacola, and permitted sundry vessels not owned or operated by it to use such wharf but denied such permission to the plaintiff. Such denial of permission to use the wharf was upheld. The Court (p. 495) said:

"Neither the public nor the plaintiff had such an *interest* in the wharf as would give to either the *right to demand* its use on payment of reasonable hire."

And again the Court (p. 500) said:

"It has not devoted its wharf to the use of the public in so far as to thereby grant to every vessel the *right* to occupy its private property upon making compensation to the defendant for the exercise of such *right*."

In *Wetmore v. Brooklyn Gas Light Co.*, 42 N. Y. 384 the plaintiff sued for damages for being excluded from the use of a pier in Brooklyn. Recovery was denied because the wharf was private and the plaintiff had no "right to fasten his vessel" to it and "unload the cargo thereon," and because the public had no "right to its use." To the same effect is *Wetmore v. Atlantic White Lead Co.*, 37 Barb. 70.

The case of *People v. B. & O. R. R. Co.*, 117 N. Y. 150, involved a certain pier in Manhattan, which the public formerly had the right to use as a street without let or hindrance. Under authority from the legislature the defendant had placed a shed upon this pier, so that it could not be used by the public, but only by such persons as it might license. The effect was to deprive the public of the right to use it, and the Court held that the permission to shed the pier amounted to "turning the public pier into a private one."

Mere license is not sufficient. There must be a *jus publicum*. Permission by the owner for one or many other persons to use a private wharf does not confer any right on the public and does not convert the wharf into a public wharf.

In *Weems Steamboat Co. v. People's Co.*, 214 U. S. 345, 356, the Court said:

"The owner of a private wharf on a navigable stream does not, on that account only, hold it by a different title from the owner of any other property which he may use himself or permit others whom he may select to use, while at the same time denying its use by any one else."

The Court added (p. 357):

"The public can obtain no adverse right as against such owner by mere user. To obtain it there must

be an intention on the part of the owner to dedicate the property to the use of the public, and there must be an acceptance of such dedication on the part of some public authority, which may sometimes be implied (but not in such a case as this), and in the absence of such dedication and acceptance the use will be regarded as under a simple license, subject to withdrawal at the pleasure of the owner."

And this is so although the use by the public has continued for more than twenty years.

Pearsall v. Post, 20 Wend. 111, aff'd 22 Wend. 425;

O'Neill v. Annett, 27 N. J. L. 290.

In *Bogert v. Haight*, 20 Barb. 251, the plaintiff was the owner of a dock and storehouse at Dresden, on Seneca Lake, used for steamboat landing and other purposes. He sued the defendant for damages for coming on the dock after having been forbidden to do so and recovered damages. The Court said:

"His employment, however, was a merely private one; he was under no *legal obligation* to allow the use of his wharf or warehouse to every person applying, even if he had suitable accommodations, and a reasonable reward was offered him; but he might limit the general license, or terminate it, in the case of any particular persons, by giving them notice not to come upon the premises."

POINT VI.

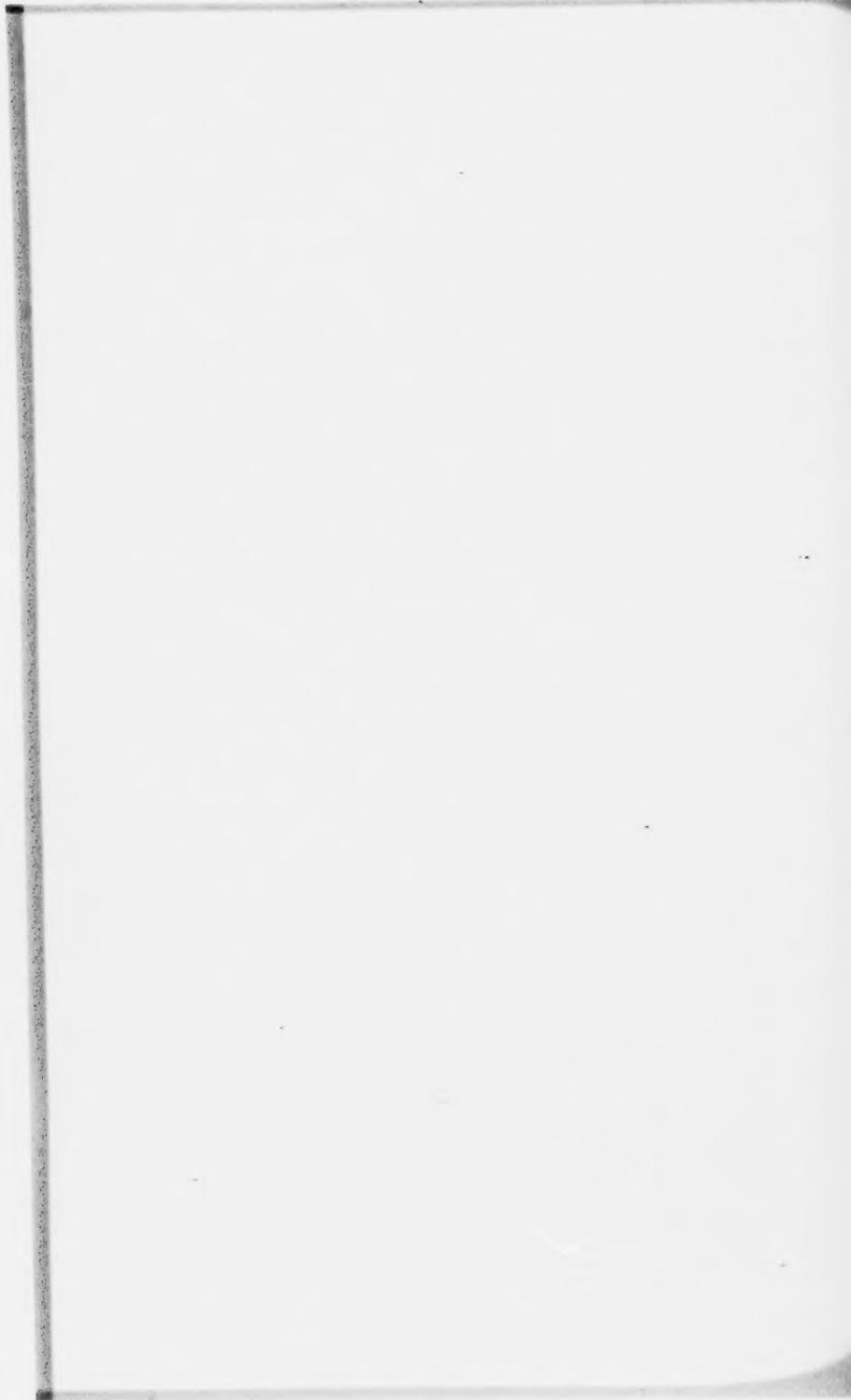
Summary and Conclusion.

From the foregoing it follows that the sole reason and purpose of the statutory regulation of the rates of wharf-

age in the City of New York is to compensate the owners of *public* wharves for the *right* of the public to use them; that the public right to regulate and the public right to use are inseparable, and that when the public right to use is absent the public right to regulate has not been asserted. No *right* on the part of the public to use the petitioner's pier No. 6 has been shown and none exists. Since the reason for the application of the statute is absent, the statute is inapplicable.

Section 859 of the Greater New York Charter is not a bar to the recovery by the petitioner of the just and reasonable value of the use of its Pier No. 6 by the Steamship "Poznan."

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CHARLES E. HOTCHKISS,
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Counsel for the Petitioner.



Office Supreme Court, N.Y.

FILED

OCT 30 1925

WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM—1925.

No.

229

NEW YORK DOCK COMPANY,

Petitioner,

—against—

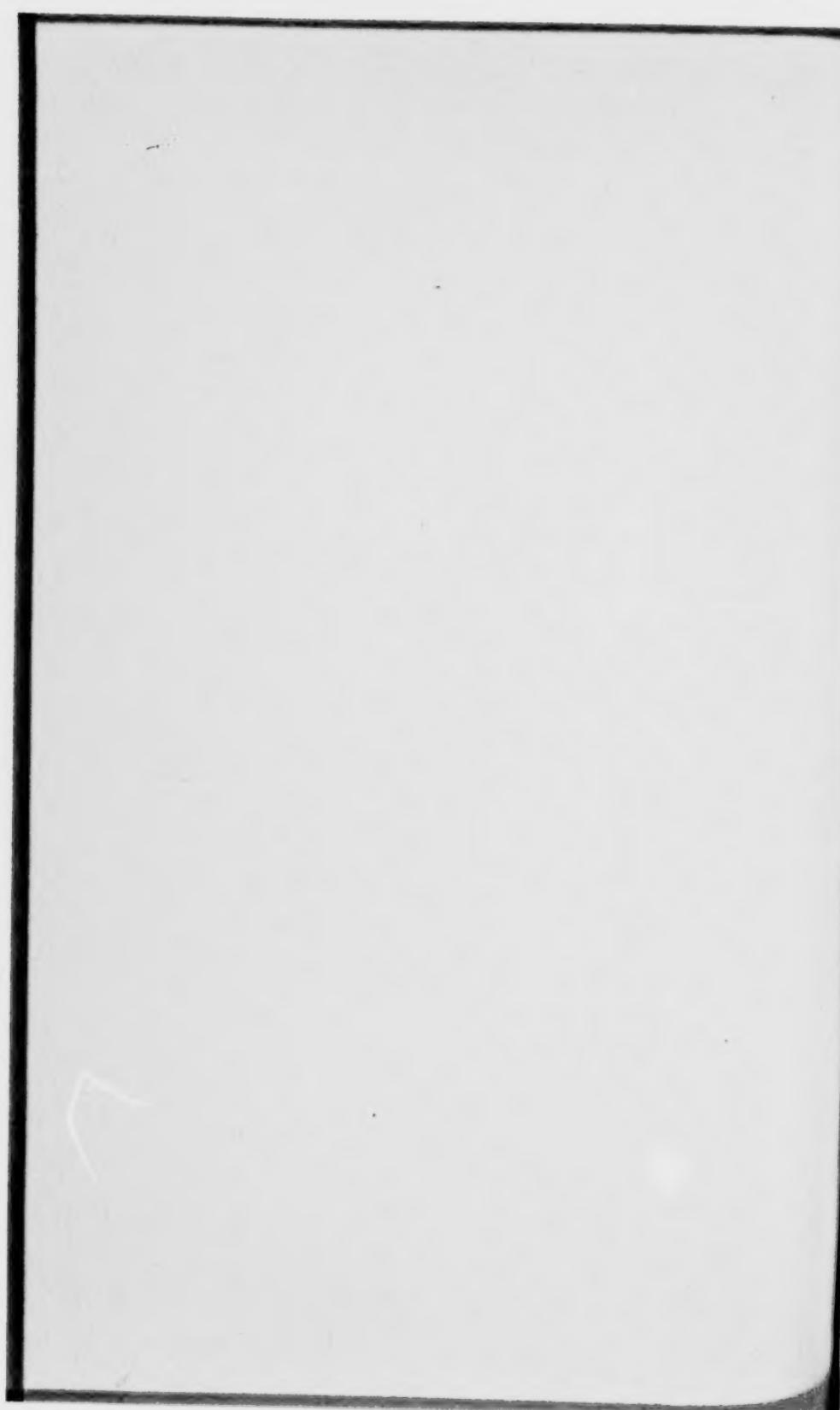
STEAMSHIP "POZNAN," her engines, etc., and JOHN
B. HARRIS COMPANY,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

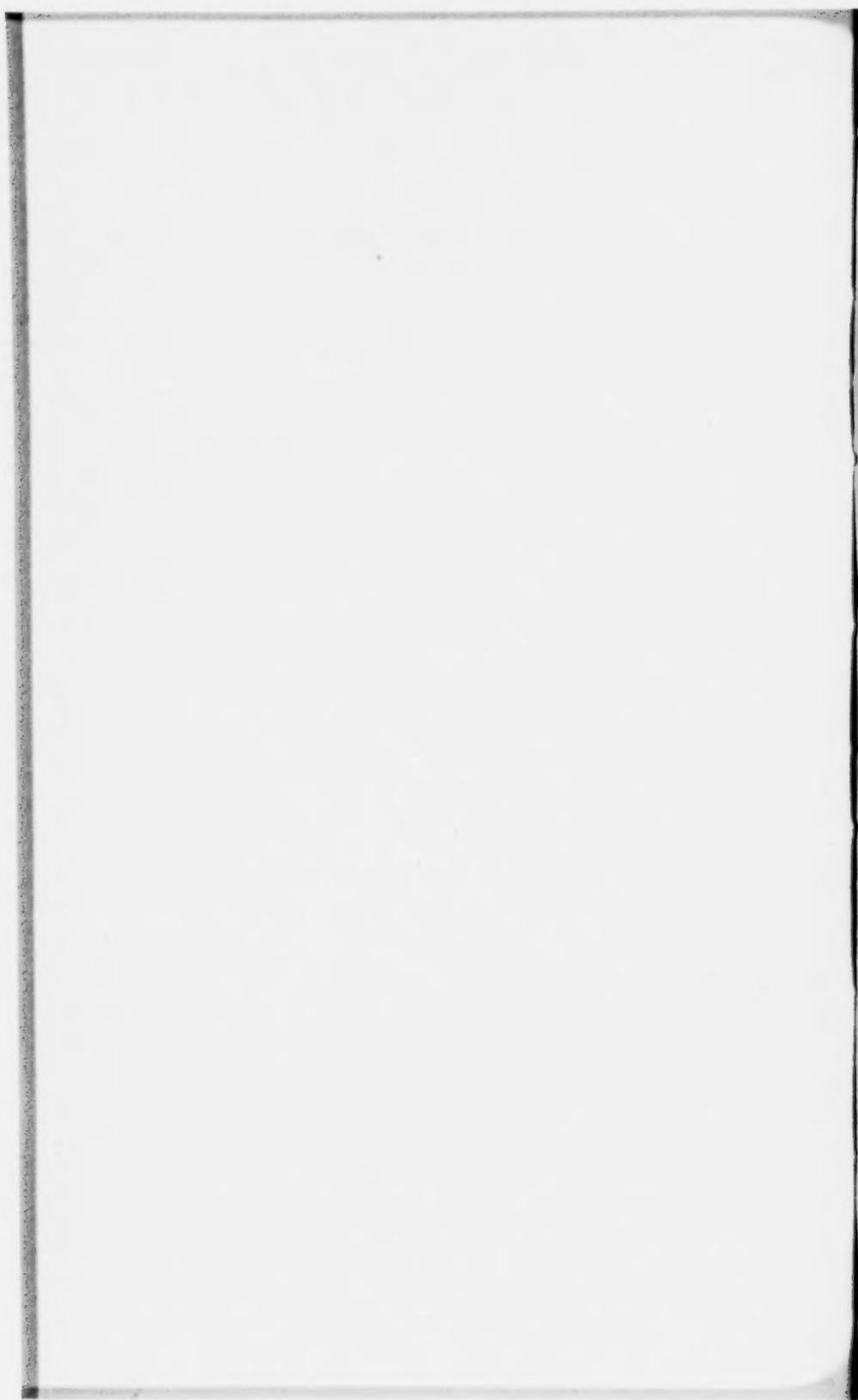
HUNT, HILL & BETTS,
Proctors for Respondent.

GEO. WHITEFIELD BETTS, JR.,
MARK W. MACLAY,
EDNA F. RAPALLO,
Of Counsel.



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IN THE
Supreme Court of the United States,
OCTOBER TERM—1925.

NEW YORK DOCK COMPANY,

Petitioner.

—against—

S. S. "POZNAN," her engines, etc., and JOHN B. HARRIS
COMPANY.

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI.**

The opinion of the District Court for the Southern District of New York (L. Hand) (R., 55-59) awarding a decree to the libellant is reported in 297 Fed. Rep. 345, and a supplemental opinion was subsequently made (R., 59, 60), which is not reported. The unanimous decision of the Circuit Court of Appeals (Rogers, Hough & Manton, *J.J.*) reversing the decree of the District Court and dismissing the libel, has not yet been officially reported, but may be found in 1925 A. M. C. 1289. It will also be found on pages 194 to 227 of the record.

Statement.

The case is of importance only to the parties. The decision of the Circuit Court of Appeals is not in conflict with a decision of another Circuit Court of Appeals on the same matter; is not in respect of an important ques-

tion of federal law, which should be settled by this Court; is not in conflict with applicable decisions of this Court; and has not so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The case does not fairly fall within any of the categories of paragraph 5 of Rule 35 of the Supreme Court of the United States, revised July 1, 1925.

Facts.

Most of the important facts in this case were stipulated by counsel and appear in the record at pp. 13 to 55. It is submitted that the following quotations from the record present the case more accurately than the inferences therefrom set forth in the petitioner's brief:

"On or about November 30, 1920, the New York Dock Company and Polish-American Navigation Corporation (owner of the *S. S. Poznan*) * * * entered into an agreement for the use of said Pier No. 6 by the said *S. S. Poznan* * * * charge to commence from 7 A. M. December 1, 1920 and to continue up to the time the steamer left and/or all cargo was removed and agreeing to pay in addition thereto for lights * * * for cleaning pier * * * and for carting dirt * * *" (R., 14).

The S. S. Poznan

"was made fast to said Pier No. 6 during the afternoon of December 2, 1920, under and pursuant to said agreement. Thereafter on December 2, 1920, said vessel was arrested and taken into possession by the United States Marshal * * *" (R., 14-15).

The vessel was arrested in a suit afterwards consolidated with others into one cause consisting of

"suits for non-delivery of cargo shipped from New York and carried by the ship to Havana and back to New York without being discharged until the ship returned and unloaded the cargo in New York. This action was against the ship *in rem* and against the Acme Operating Corporation, charterer of the ship, and the Polish American Navigation Corporation, the owner of the ship *in personam*, and an interlocutory decree entered against all three" (R., 16).

"Said vessel was continuously in the custody of the Marshal from the time he took possession of it until it left said pier on March 11, 1921" (R., 16).

"Thereafter * * * New York Dock Company rendered its bill to Polish Navigation Corporation in the sum of * * * \$26,462.03" (R., 15).

"On said indebtedness Polish American Navigation Corporation paid New York Dock Company * * * \$9,500, leaving a balance of principal unpaid amounting to \$16,962.03" (R., 15, 16).

"On or about December 9, 1921, the New York Dock Company and the Polish American Navigation Corporation entered into the agreement set forth in the two letters, copies of which are hereto annexed * * * marked Exhibits B and B-1, and the first payment of \$500 was made on December 16th, 1921 * * *" (R., 20).

The letters referred to—Exhibits B and B-1 (R., 27, 28), show an agreement for a compromise settlement.

On January 5th, 1921, Judge Augustus N. Hand signed on application of Acme Operating Corporation, the charterer, an order directing the Polish American Navigation Corporation, the owner, and all intervening libellants to

"show cause * * * why an order should not be entered herein directing the Polish American Navigation Corporation to move on the 6th day of January, 1921, after working hours of that day the S. S. *Poznan* from Pier 6, Brooklyn, N. Y., where the said steamship is now laying, to another pier whereat the said steamship *Poznan* can properly and expeditiously discharge and further directing said Polish American Navigation Corporation to employ twelve gangs of stevedores in unloading said steamship" (R., 42).

On January 5th, 1921, Judge Augustus N. Hand signed an order appearing in the Record as Exhibit H (R., 54, 55), which recites that after hearing proctors for various intervening shippers and

"after hearing members of the shippers' committee in person and the members of the shippers' committee having requested the proctors for the Polish American Navigation Corporation and Acme Operating Corporation to suspend discharging the vessel for one week in order to enable the merchandise to be properly separated on the dock and the dock cleared for further discharging of the vessel and the Acme Operating Corp., the charterer, Polish American Navigation Corporation having acquiesced in said request, it is ordered that the motion of the Acme Operating Corporation be denied with leave to renew in eight days."

Decision of the District Court.

The District Court held (1) that the maritime lien for wharfage "arose *de die in diem* and ceased on December 2, if it ever began at all" (R., 57) (the vessel was arrested by the Marshal December 2nd); (2) but that nevertheless

"the libellant, which furnished the wharf, has an equitable claim on the fund though not a maritime lien on the ship, and in priority to the lienors to protect whose liens the service was rendered" (R., 57),

or, as put in the District Judge's supplemental opinion,

"the lien here established was an equitable lien against the lienor's own rights in the vessel arising after she was in custody. It was a lien on their liens * * *" (R., 59).

Decision of the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals contains (1) a discussion of whether a maritime lien can arise when the vessel is in the custody of the Marshal (2) a discussion of whether or not a maritime lien for wharfage arises when the contract is made by the owner and not by the master of the vessel and the effect of the Merchant Marine Act of 1920. No decision on this point is announced, the Court stating

"As it is not important in the view which we take of the case, we express no opinion concerning it at this time" (R., 218).

(3) The following holding and finding:

"It is enough for the present purpose that no lien attached while the ship was in *custodia legis*, which was practically the entire period for which the bill was rendered" (R., 218, 219).

(4) A negative answer to the following question:

"Is the libellant nevertheless entitled to an equitable lien, and if so, one which is entitled to priority over the liens of the libellants in the consolidated suit" (R., 219).

Questions Presented.

The only questions to be presented to this Court for review, therefore, are (1) Did a maritime lien arise while the vessel was in the custody of the Marshal, and (2) If no maritime lien arose, was there nevertheless an equitable lien on the maritime lien of the consolidated libellants which would require a Court of Admiralty to decree to the New York Dock Company prior payment from the proceeds of the vessel in the registry of the Court.

On page 3 of the petition the petitioner sets forth the questions which it claims are presented upon this record. Of these neither 1 nor 2 were decided by or even presented to either the District Court or the Circuit Court of Appeals and are entirely unnecessary to support the decisions of either of those Courts. Both questions 3 and 4 involve questions of fact which were decided adversely to the petitioner by the District Court and the Circuit Court of Appeals. No question of public importance was

presented. The only matter which it is claimed in the petition (p. 5) is one of public importance is as to whether a maritime lien for wharfage exists unless expressly waived, which question is not at issue in this case and which the Circuit Court of Appeals expressly declined to pass on, stating (R., 218) :

"The question whether wharfage is a 'necessary' within the meaning of the Act of 1920 was not argued when this case was heard. As it is not important in the view which we take of the case we express no opinion concerning it at this time."

POINT I.

Question as to whether maritime lien existed no ground for review.

(a) Not a question of law.

There is no conflict whatsoever in the decisions of the various Circuit Courts of Appeals to the effect that where wharfage is furnished to a vessel which is in the custody of the law and therefore such services do not tend to facilitate its use as an instrument of commerce, no maritime lien arises. If this point has not been decided by this Court, the reason doubtless is that there has been no question as to the principle involved and the only difference in the various decisions has been its application to the particular state of facts.

(b) Errors in petitioner's brief.

On page 8 of the Petition and Brief appears the statement that the vessel was not arrested until wharfage

"for one or two days had accrued under the contract." It is true that under the contract with the owner wharfage was to commence at 7 A. M. on December 1st, but no lien for wharfage could possibly arise until the vessel arrived at the dock, which was not until December 2nd, or the same day she was taken into custody by the Marshal. Petitioner omits to mention that it was paid the sum of \$9,500 which was far in excess of the price of one or two days' wharfage. Thus, even though it be admitted that the lien for such wharfage arose prior to the arrest and survived the arrest, the complete answer is that such lien was fully paid. Of course the lien only arose *de die in diem* as said by the District Judge, and would not continue to increase from day to day after the vessel was in the Marshal's custody simply because it had a valid inception. The wharfage by the contract was only payable by the day (R., 14) and the contract was not for any definite period.

(e) Court below denied maritime lien for reason other than that given by petitioner.

The petitioner has attempted to make it appear that the reason that the Circuit Court of Appeals denied it a maritime lien was because the credit of the vessel was not expressly pledged. In support of this contention, petitioner at pages 9, 10, 14, 16 and 18 of its brief quotes certain excerpts from the opinion of the Circuit Court of Appeals. The excerpts quoted on pages 9, 14, 16 and 18 of the brief refer to cases decided before the passage of the Merchant Marine Act of 1920, are couched in the past tense and do not purport to be decisive here, since the Court proceeds to consider whether the provisions of that act have not changed the previous law. The last

excerpt on page 9 and those on page 10, as is perfectly clear from the opinion, do not refer to the maritime lien claimed by petitioner, but are made only in connection with the so-called equitable lien allowed by the District Court. The opinion of the Circuit Court of Appeals is divided distinctly into two parts, the first part dealing with the maritime lien, and the second part with the equitable lien, and these statements are contained in the second part of the opinion. As the Circuit Court of Appeals in this second part of the opinion was engaged in a consideration of whether the inherent equities supported petitioner's position, it was only in this connection that that Court considered whether or not there had been a pledging of the credit of the vessel.

(d) No Court order permitting use of petitioner's dock.

Petitioner makes a further effort to sustain its claim to a maritime lien by striving to make it appear that the *Poznan* remained at petitioner's dock under order of the District Court (Petition and Brief, p. 2):

The only order to which petitioner can possibly refer is the order (R., 23-26) by which various shippers, many of whom were not among the consolidated libellants, were permitted to re-take their cargo upon fulfilling certain conditions as to the filing of bonds conditioned for the payment of any freight due, etc., and makes no mention whatsoever of petitioner's wharf, or of where or how the cargo was to be discharged. Indeed, if it wished, petitioner could have collected wharfage from such shippers. This order was not even in one of the consolidated libels but was in a libel for possession by a shipper.

(e) No objection by respondent to moving vessel.

The petitioner further makes frequent references to the fact that the libellants had objected to the removal of the vessel from petitioner's wharf. There is nothing whatsoever in the record to show that the respondent herein was one of the objecting libellants, or that any of the libellants objected, except those whose particular shipments were divided, part having been discharged and part still remaining on the vessel. These did not wish the vessel moved until all of their cargo was discharged. Those whose shipments were already on the dock, naturally, had no interest in the matter, and those whose shipments were on the vessel were rather inclined to have the ship moved to some other dock where the discharge could be expedited. The petitioner omits to mention that the application for moving the vessel was not made by it, but by the Acme Operating Corporation; that petitioner was not a party to the application; that although the order denying the application expressly gave leave to renew in eight days, no one, including the petitioner, saw fit to press it.

POINT II.

Question of whether an equitable lien existed on the maritime lien of the lienors no ground for review.

There is no conflict of decisions upon this point, undoubtedly because such an amazing theory has never before been suggested. As the Circuit Court of Appeals said (R., 219):

"We confess that at first blush, the suggestion strikes us with surprise. That while the wharf

owner has no maritime lien during the period the ship was in *custodia legis*, he, nevertheless, has an equitable lien, and that such lien is entitled to priority over the maritime lien of the shippers."

And again (R., 226) :

"No decision asserting any such doctrine is known to us. We think it unsupported by authority and contrary to principle. The effect of creating an equitable lien and giving it priority over the maritime lien is in plain language an attempt to extend the maritime lien by construction by not calling it a maritime but an equitable lien."

Petitioner deals with this question in the fourth point of its brief, and for obvious reasons cites no authority in support of its argument.

POINT III.

No equity in petitioner's position.

There is no controlling equity in the petitioner's situation. Its hardships, if any, were of its own creation. It first hired its pier to an irresponsible owner, it then permitted various shippers, who had no connection with the consolidated libel to remove their goods without paying any wharfage, it next let its bill run indefinitely, without taking any steps for a long time to collect it, and without even notifying the consolidated libellants of its unpaid charges, so far as the record shows, and it now contends that this Court should hear its claim to charge the consolidated libellants with the whole wharfage for the goods of all the shippers, including those who did not join the consolidated libel.

CONCLUSION.

This case presents only two possible points for review, since these were the only points necessary to the decision in the Court below, or which were actually decided by it.

The first of these points, as to the existence of a maritime lien, was decided by the Court below in accordance with well settled principles, there being no conflict in the decisions on the law governing, and the only question being as to the application of that law to the specific facts of the instant case.

The second of these points, as to the existence of some kind of equitable lien on the maritime liens of the lienors, was decided by the Circuit Court of Appeals in accordance with firmly established principles, there being no authority which could conceivably support a contrary view, and is not of sufficient importance to be reviewed by this Court. The petitioner cannot ask for a review of questions not decided by the Courts below, and the questions actually decided being questions of general law, not decided in a way probably untenable or in conflict with the weight of authority, do not warrant review by this Court and therefore the petition should be denied.

Dated, New York, October 28, 1925.

Respectfully submitted,

GEO. WHITEFIELD BETTS, JR.,
MARK W. MACLAY,
EDNA F. RAPALLO,

Of Counsel.

Office Supreme Court, U. S.
F I L E D

MAR 11 1927

WM. R. STANSBURY
CLERK

Supreme Court of the United States.

OCTOBER TERM—1926.

No. 229.

NEW YORK DOCK COMPANY,

Petitioner,

—against—

Steamship "POZNAN", her engines, etc., and

JOHN B. HARRIS COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

On Writ of Certiorari to the United States Circuit
Court of Appeals for the Second Circuit.

GEORGE WHITEFIELD BETTS, JR.,
MARK W. MACLAY,
EDNA F. RAPALLO,

Counsel for Respondent.



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Supreme Court of the United States,

OCTOBER TERM, 1926.

No. 229.

NEW YORK DOCK COMPANY,

Petitioner,

—against—

Steamship POZNAN, her engines, etc., and

JOHN B. HARRIS COMPANY,

Respondent.

BRIEF FOR RESPONDENT, JOHN B. HARRIS COMPANY.

Official Reports of the Opinions Below.

The opinion of the Circuit Court of Appeals (R. 145) is reported in 9 Fed. (2d) 838; the main opinion of the District Court (R. 37) in 297 Fed. 345.

The supplemental opinion (R. 40) of the District Court has not been reported.

Petitioner Has Shown No Adequate Reason for Invoking the Jurisdiction of This Court.

None of the grounds for review stated in Supreme Court Rule 35, 5 (b) exist. Petitioner has cited no conflicting decision of another Circuit Court of Appeals. No question of local law is involved. The Court did not

decide any question of general law in a way untenable or in conflict with the weight of authority. No Federal question is involved. Despite the statements on page 48 of petitioner's brief, the Circuit Court of Appeals did not determine whether wharfage is a necessary within the meaning of the Act of 1920 and stated definitely: "We express no opinion concerning it at this time" (R. 161). Consequently the construction of that Act is not involved. There has been no departure from the usual course of judicial proceedings. Therefore the case is one of which this Court in the exercise of its discretion should refuse to take jurisdiction.

Statement of the Case.

This case is here on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. On June 17, 1924, the District Court for the Southern District of New York, entered a decree for Sixteen thousand six hundred twenty-eight and 70/100 (\$16,628.70) Dollars with interest in favor of the petitioner (libellant below) for wharfage and incidental services rendered the *SS Poznan* (R. 138). On July 23, 1925, the Circuit Court of Appeals for the Second Circuit reversed this decree, and on August 10th, 1925, entered an order denying a rehearing.

The libel of the petitioner against the *SS Poznan* was filed on April 9, 1921. It alleges that on December 1, 1920, the master of the *SS Poznan* or the person to whom the management of said vessel was entrusted placed the *Poznan* at a wharf owned by libellant where she remained until March 12, 1921; that there is due for wharfage and lighting and cleaning of said wharf Seventeen thousand four hundred sixty-two and 03/100 (\$17,462.03) Dollars

with interest, which is a fair, reasonable and customary charge, and prays that the vessel be condemned and sold to pay said demand (R. 3, 4).

No answer was made on behalf of the vessel or her owners and a default decree was entered. Thereafter the respondent, John B. Harris Company, a cargo owner who had theretofore libelled the *Poznan* for damages arising out of breach of a contract of carriage, applied for and obtained leave to intervene and defend herein (R. 4, 5).

The answer of the respondent to the libel alleges that said wharfage and other services were not furnished on the credit of the *Poznan* nor arranged for with the master but were furnished solely upon the request of and in accordance with an agreement with, and upon the credit of the owner of said vessel, and that the vessel is not responsible therefor. The answer further alleges that the SS *Poznan* was in the custody of the United States Marshal at the times during which said wharfage is alleged to have been furnished and therefore no maritime lien could arise against the vessel (R. 6, 7).

The following facts were stipulated (R. 8-37) :

Polish-American Navigation Corporation (hereinafter called the Polish-American) is a Delaware corporation maintaining its principal office in New York City and was the owner of the SS *Poznan*, a vessel of 8,405.72 gross, 5,298 net and 11,250 dead weight tons, registered at the Port of New York (R. 8). On or about November 30th, 1920, petitioner and the Polish-American entered into an agreement for the use of Pier No. 6 by the *Poznan* to discharge, the Polish-American agreeing to pay Two hundred fifty (\$250) Dollars per day, charge to commence from 7 A. M., December 1st, 1920, and to continue up to the time the steamer left and/or all cargo

was removed, and certain sums for lighting and cleaning in addition (R. 8, 9). This agreement was not made with the master of the vessel, which arrived from Cuba and was made fast to said pier during the afternoon of December 2nd, and was arrested by the United States Marshal on the same afternoon (R. 9). A number of libels (subsequently consolidated and referred to in the record herein as the consolidated cause) for non-delivery at Havana of cargo shipped from New York and carried by the ship to Havana and back to New York without being discharged until the ship returned, were filed against the *Poznan*, the majority being filed prior to the libel of the petitioner (R. 10).

On December 7, 1920, A. M. Capen's Sons, Inc., filed a libel for possession of 403 bundles of wrapping paper against Acme Operating Corporation, the charterer of the *Poznan*, which paper had been part of the cargo on the steamship *Poznan*. The Court on the same day, after hearing counsel for the Acme Operating Corporation and the Polish-American, made an order for the delivery of the said paper, which was then being discharged, to the said A. M. Capen's Sons, Inc., upon the surrender of the bill of lading and filing of a bond to cover any return freight that might be due and also permitting any shipper of goods on the *Poznan* to obtain possession of his shipment upon similar conditions and upon his appearing in the above possessory libel of A. M. Capen's Sons, Inc. (R. 9, 16). Under this order many shippers obtained their cargo (R. 9). Discharge of the vessel was completed February 18, 1921, and delivery of the cargo from the pier on March 1st, 1921. The vessel remained fast to the pier until March 11, 1921, and thereafter the pier was cleaned and ready for another vessel on March 12, 1921. Thereafter, pursuant to the agreement, the petitioner ren-

dered its bill to the Polish-American in the sum of twenty-five thousand three hundred thirty-three and 33/100 (\$25,333.33) dollars for wharfage, eight hundred and five (\$805) dollars for lights and three hundred twenty-three and 70/100 (\$323.70) dollars for pier cleaning. On said indebtedness the Polish-American paid to petitioner at different times sums totaling nine thousand five hundred (\$9,500) dollars (R. 9, 10).

The vessel was continuously in the custody of the Marshal until she left the pier on March 11, 1921 (R. 10). On January 6th, 1921, the petitioner presented a bill for wharfage to the Marshal with a letter requesting advice in case there was any question as to his liability and stating that the Dock Company understood that the vessel had been under the Marshal's custody since the beginning of December and that as owner of Pier 6 it had entered into an agreement with the Polish-American for such wharfage with reference to same. On January 7th it wrote to the Marshal a letter referring to the Marshal's objection to the charge as improper as covering discharge and care of the cargo (R. 10, 11, 12) and received in reply a letter from the Marshal declining liability, in which the Marshal said

"The Marshal does not and will not assume liability for any charges against this vessel, until so directed by order of the Court" (R. 13).

On December 9th, 1921, the petitioner and the Polish-American agreed that the Polish-American was to pay its indebtedness of Seventeen thousand four hundred sixty-eight and 03/100 (\$17,468.03) Dollars, plus compromise settlement of interest in certain installments therein specified and in consideration thereof petitioner was to

refrain from pressing its claim for the sale of the *Poznan* (R. 13, 17, 18). The first payment only under said agreement was made, said payment being made and accepted after petitioner's exchange of letters with the Marshal (R. 13). Petitioner thereafter requested that its bill be included in the Marshal's bill of costs, which was done, but upon objection, same was struck out by the Clerk and by the Court as not a proper disbursement by the Marshal, without prejudice to the right of petitioner to claim against the proceeds of the vessel, if any such right there be (R. 13, 22, 23, 24).

The Polish-American, as owner, had chartered the *Poznan* under a time charter to the Acme Operating Corporation, by which charterer she was loaded at New York and sent on her voyage to Havana. Due to the congestion of the port there which existed in 1920, the owner claimed that she could not be discharged and therefore ordered her back to New York to discharge there, where it undertook the discharge at Pier 6, in a more or less intermittent manner, due to the insufficiency and inadequacy of the pier and the lack of opportunity to sort the goods according to marks. After this discharge had continued for more than a month with various partial lots of cargo piled up on the pier in such a manner as to make it almost inaccessible to the cargo owners, and as charter hire at the rate of \$67,500 per month was becoming due from the Acme Company to the Polish Company for every day that such discharge continued, the Acme Company demanded of the Polish Company that it move the *Poznan* from Pier 6 to another pier where the discharge could be completed expeditiously, advising that an empty dock in the immediate vicinity could be procured immediately (R. 29, 30, 31, 32).

On January 5, 1921, as this demand was refused, the Acme Operating Corporation obtained in the possessory suit of A. N. Capen's Sons, Inc. vs. 403 bales of wrapping paper and the Acme Operating Corporation, an order from Judge Augustus N. Hand requiring the Polish-American Navigation Corporation and all libellants intervening in the possessory suit to show cause on the same day why an order should not be entered directing the Polish-American to move the *Poznan* on January 6th to another pier, where she could discharge more expeditiously (R. 27, Exhibit G, 28-36). Upon the same day, on the above mentioned moving papers, with proof of due service thereof, Judge A. N. Hand signed an order as follows:

"After hearing members of the Shippers' Committee in person, and the members of the Shippers' Committee having requested the Proctors for the Polish-American Navigation Corporation and Acme Operating Corporation to suspend discharging the vessel for one week in order to enable the merchandise to be properly separated on the dock and the dock cleared for further discharging of the vessel and the Acme Operating Corp., the charterer Polish-American Navigation Corporation having acquiesced in said request, it is ordered that the motion of the Acme Operating Corporation be denied with leave to renew in 8 days" (Exhibit H, R. 36-37).

The motion, it appears, never was renewed and the discharge of the vessel continued until it was finished.

This case came on for trial before Judge Learned Hand, who filed an opinion holding that the petitioner had no maritime lien because the ship was in the custody

of the Court and the Court alone could pledge her upon such a lien. He further held, however, that the petitioner had an equitable lien on the fund in Court, in priority to the maritime liens of the consolidated libellants, for the wharfage between December 2nd and February 18th, when the ship was discharged and that after that date the rate should be what was paid by the *Poznan* after March 12th, at the usual statutory open wharfage rate for a vessel of that size, amounting to \$29.49 a day, unless it appeared that the lienors insisted on her remaining at Pier 6 after February 18th, or that her later berth was not available, or that they were benefitted by the continued higher wharfage there (R. 37-39). He later filed a supplemental opinion in which he held that no allowance was to be made for protection of the goods of the consolidated libellants on the pier after discharge and that the lien which he allowed was an equitable lien against the lienors' own rights in the vessel arising after she was in custody (R. 40).

Accordingly he entered his own decree on July 13, 1923, that the petitioner had an equitable lien upon the proceeds of sale in priority to the maritime liens of the consolidated libellants and referring it to a Commissioner to take proof and report on the reasonable value of the benefit enjoyed by the *consolidated libellants* from the wharfage from December 2nd, 1920, to February 18th, 1921, and from February 18th, 1921 to March 11th, 1921, and also the value of any added benefit from incidental services (R. 41-42). Hearings were had before the Commissioner resulting in a report by him allowing the full contract rate of \$250 per day from December 2nd to February 18th, the time when the vessel was discharged, and also from February 18th to March 11th, 1921, the period during which she lay empty at the wharf, and

during a large part of which time there was no cargo on the wharf, in spite of the fact that the petitioner's own witnesses Firth and Becker (R. 67, 68, 74) had shown that from \$50 to \$75 a day was the usual charge for berthing a vessel at a wharf where no cargo was being discharged, and where not only the wharf but the other side of the wharf was left free for other employment, and in spite of the fact that the uncontradicted testimony showed that many of the cargo owners who had become consolidated libellants had suffered enormously by the inadequacy and bad condition of the pier, and losing entire sight of the fact that not all of the parties in the possessory libel were parties in the consolidated libel. This report was later confirmed by the Court upon the same theory of a benefit to the consolidated libellants and an equitable lien, as that on which the interlocutory decree had been based. The Court adverted to the fact that the Committee of cargo owners seemed to have objected to the removal of the *Poznan*, apparently referring to the informal hearing at Judge A. N. Hand's Chambers on January 5th, 1921, and overlooked the fact that no objection was or could very well have been made to the removal of the vessel after February 18th when she was completely discharged (R. 138). A final decree was thereupon entered, based upon the decisions of the District Court, awarding the petitioner the full amount of \$250 per day from December 2, 1920 to March 11, 1921, with the charges for lighting and cleaning, together with interest and costs amounting in all to \$20,325.41 and decreeing that the same was a prior lien upon the proceeds of the sale of the vessel.

An appeal was thereupon taken by the respondent John B. Harris Company to the United States Circuit Court of Appeals for the Second Circuit. That Court

with Judges Rogers, Hough and Manton sitting, filed a unanimous opinion holding that the District Court correctly decided that no maritime lien for the wharfage arose because the vessel was in the custody of the Court and further deciding that the wharfage was furnished by the petitioner on the credit of the owner, the Polish-American, and not on the credit of the vessel and that no maritime lien arose under the general maritime law (R. 159); also, that the equitable lien decreed by the District Court on the proceeds of the vessel had no foundation in authority and was contrary to principle, and that the decision below based thereon appeared to have been wholly unwarranted. The Court also remarked that the question as to whether wharfage is a "necessary" within the meaning of the Merchant Marine Act of 1920 was not argued when the case was heard and that as it was not important in the view taken of the case, no opinion concerning it was expressed (R. 161). The decree of the District Court was accordingly reversed. Thereafter this Court granted petitioner's application for certiorari to review the decision of the Circuit Court of Appeals.

POINT I.

Both lower Courts properly held that no maritime lien for the wharfage, lighting and cleaning existed against the vessel or her proceeds because of the fact that the vessel was, during the period in question, in *custodia legis*.

A. REASONS FOR THE RULE.

This doctrine has long been established law in this country and is based on several considerations. In the

first place, a maritime lien, as has often been said, is a secret one which may operate to the prejudice of general creditors and purchasers without notice. It is therefore regarded *stricti juris* and cannot be extended by construction, analogy or inference, as held by this Court in *Osaka Shosen Kaisa v. Pacific Export Lumber Company*, 260 U. S. 450. In the second place, as the Court takes the place of the owner, no lien can be created against a vessel in the custody of the Court except by an order of the Court. While the vessel is in the Court's custody it is held to await the outcome of the litigation for the benefit of those persons who are ultimately entitled to it. It would be a sad travesty on justice if it were possible for the owner and other parties whose interest might be advanced thereby to impress a lien on a vessel while in the Court's custody to the detriment of those who had other interests in and were ultimately to receive her. Accordingly, the rule was early laid down that if one desires to impress a lien on a vessel in custody he must apply to the Court having that custody so that the Court may investigate the facts and determine whether the lien is one that should be impressed or not. The authority of the owner to create a lien is suspended, as the Court stands for the time being in the shoes of the owner. How voluntary this rule is in the light of facts such as exist in the case at bar is readily seen.

The owner was interested in continuing the discharge of the ship in the hope of recovering freight on the cargo for the return voyage from Hawaii and thus getting her released for further use. Certain shippers, part of whose cargo had been discharged on Pier 6, apparently preferred to have the remainder discharged

there. Other shippers whose cargo had all been discharged, and those who had none of their cargo discharged, were anxious that it should be discharged somewhere else. Those whose cargo was being discharged into lighters over the side of the ship had no particular interest in the matter. Petitioner was interested in keeping the vessel at Pier 6 so as to collect the large amount of daily wharfage from the owner under its contract and if it could collect the \$250 daily rate for the period after the ship was entirely discharged and even after the cargo was all removed it was especially interested in keeping the vessel there as that freed the other side of the pier and, in fact, for part of the time the whole pier itself. The cargo consolidated libellants who were interested in keeping down the expense, had no knowledge that the petitioner was asserting a lien against the ship or that the wharfage payable under the contract with the owner was not being paid. No demand or notice of any such claim or lien was at any time given by the petitioner to such libellants. Indeed, when petitioner wrote its two letters to the Marshal of January 6th and 7th, 1921, and received the Marshal's reply of January 7, 1921 (R. 11, 12, 13), the letters themselves show that the petitioner knew that the vessel was in the custody of the Marshal; that he objected to any such exorbitant claim for wharfage based largely on the charge for discharging and stowing the cargo, and that the Marshal did not and would not assume liability for any charges against the vessel until so directed by order of the Court, and that an application had been made to Judge Hand with reference to moving the vessel, which order had been denied with leave to renew in eight (8) days. Yet, in

spite of all this, not a move was made by the petitioner either to apply to the Court for an order with reference to the wharfage or to give any notice to the consolidated libellants.

B. THE AUTHORITIES HOLD WITH REMARKABLE UNANIMITY THAT THERE CAN BE NO MARITIME LIEN UNDER THE CIRCUMSTANCES AT BAR.

In *The Estaban de Autanano*, 31 Fed. 920, one of the early cases establishing the rule, Judge Pardue held that there could be no lien for services or supplies furnished to a vessel while in the custody of the Court. No point is made in the opinion that the seizure was by the Sheriff rather than by the Marshal. The vessel was all ready to sail with passengers, cargo and crew aboard at the time of the seizure, and the expectation that matters would be settled was so strong that many passengers remained on board for several days thereafter. The crew remained on board working under the direction of the master in painting, scrubbing and otherwise keeping the ship in order. Various libellants at the instance of the master, and expecting that difficulties would soon end and the voyage proceed, furnished supplies needed for the officers and crew and for the ship. No application, however, was made to the Sheriff or to the Court for authority to furnish supplies on the credit of the ship. Later an order was made to furnish provisions to the crew to the extent of \$25 per day. The Court ordered that the libels of the seamen for services rendered after the seizure be dismissed, and those of the material men should be maintained only for the amount of supplies furnished before the seizure of the vessel, and that the lien claim

of a laundry for washing the linen of the ship during the seizure should be denied, saying:

"When the sheriff of the parish of Orleans, Louisiana, seized and took into his possession, under process from the state court, the steamship *Antunano*, she went into the custody of the law, and her contemplated voyage was broken up and abandoned, and thereby the authority of her owners, and of their agents, the master and ship's husband, to thereafter affect the ship by any conduct or contract to result in a lien on the ship, was ended. By the seizure all persons were notified of the change of control and possession. While the ship was in the custody of the law, it is doubtful whether on any account, or for any service (except, perhaps, for salvage, or through a collision), any lien could arise on the ship; certainly not without the express authority of the court having the property in possession. Liens for supplies and materials are based on contracts entered into on behalf of the ship. Where there is no representative of the ship or her owners authorized to contract, there can be no contract, and therefore no lien based on a contract. The supposed necessities of the ship, or of her crew, would warrant no person in interfering without the authority of the sheriff or the court" (p. 924).

In *The Grapeshot*, 22 Fed. 123 (D. C., S. D. N. Y.), Judge Brown held that a lien for coal supplied to the vessel while she was in the lawful custody of the Marshal must be postponed to all other claims, stating as follows (pp. 124, 125):

"It cannot be allowed that the claims of libelants shall be prejudiced by any supplies subse-

quently furnished while the vessel is legally in the custody of the Court, through the possession of the Marshal, in consequence of any consent that he may have given to her further navigation."

It is thus seen that the Marshal may not impose any maritime lien on the vessel in his custody by any consent to her navigation. This answers the argument of petitioner that because the Marshal did not interfere with the discharge he in some way impressed a lien on the vessel for wharfage.

In *The Augustine Kobbe*, 37 Fed. 702, claim of lien was made for the sum of \$343 advanced by the libellants as charterers after the seizure of the vessel. The Court says:

"From the evidence it appears that this claim arose while the vessel was in the custody of the Court, and, as it was not necessary for the due care and preservation of the vessel, it cannot be recognized as a lien. * * * I think the principle laid down in the case of *The Young America*, 30 Fed. Rep. 790, and of the *Esteban De Antunano*, 31 Fed. Rep. 921, is a just one, and should be applied in this case to the item of \$343, claimed as a part of the damages sued for. That principle, as applied here, is that when the Marshal seized and took into his possession, under process from this court, the vessel, she went into the custody of the law, and her contemplated voyage was broken up and abandoned, and thereby the authority of her owners and of their agent, the master, to thereafter affect the ship by any contract or conduct to result in a lien on the ship, was ended. By the seizure all persons were notified of the change of control and possession" (p. 702).

In a former decision affecting this same vessel (*The Augustine Kobbe*, 37 Fed. 696), the Court held that the claim of a mate who remained on the vessel after her seizure, seeking compensation for services in aiding the Marshal in handling her, was not a maritime lien on the proceeds (p. 701) :

"Of whatever merit the claim might be as a part of the Marshal's expenses, if recognized by him, it certainly is not a maritime claim to be enforced against the proceeds of the vessel."

In *The Young America*, 30 Fed. 789, cited by the petitioner (Brief, p. 30), the parties who libelled the vessel permitted her to pursue her ordinary business around the harbor with no Marshal's keeper on board and no notice of attachment posted upon her mast. The Court found on the facts that the vessel was not in the custody of the Court at all and sustained the lien claimed by one who had furnished supplies to the vessel without any notice of her arrest. Not only was there no possession by the Marshal but no publication of the summons until after the lien claimants dealt with the vessel. A coal dealer was allowed a lien for the coal supplied before he had any notice of the attachment, but for coal supplied thereafter no lien was allowed. The Court said at page 790:

"When a vessel is arrested in admiralty, under process of the court, the law requires that she be kept safely by the marshal for the benefit of the parties to the cause, and of all others who may be interested in her. It has been often held, accordingly, that the marshal has no authority to create or to permit charges upon the property beyond

such as are necessary for its due care and preservation; and no claims arising while the vessel is in the custody of the court are recognized as liens strictly, though they may be paid out of the remnants."

In *The Philomena*, 200 Fed. 873 (D. C. Mass.), Judge Dodge held that an engineer remaining on the vessel after it had been taken into the Marshal's custody had no lien for wages during that period.

In *The Geisha*, 200 Fed. 865, 870, the same Judge held that where a vessel was seized by the Sheriff while repairs were being made upon her, and while she was at a wharf, there was no maritime lien for the wharfage accruing while she was in the Sheriff's custody and that for that wharfage the libellant must look to the Sheriff; that the Sheriff could not have kept her at the wharf against the libellant's objection and he stood in no such relation to the vessel as authorized him to bind her by any agreement with libellant, and that any expense incurred for wharfage by the Marshal while the vessel was in his custody was presumably included in his charges on the warrant under which he arrested and held her. Accordingly all wharfage was disallowed as a lien for the period while the vessel was in the Court's custody.

In *The Bethulia*, 200 Fed. 876, the same Judge also held that an engineer of a steamer had no maritime lien for his wages after the steamer was attached in the State Court by the Sheriff, and that the engineer must look to the owner for his pay during that period.

In *The Nissequogue*, 280 Fed. 174 (D. C., E. D. N. C.),

the Court held that during the time the Marshal had no actual custody, no keeper on board, and had posted no notice on the vessel, the seamen remaining on the vessel and a materialman furnishing supplies without any notice of the libel could acquire a lien on the vessel, but that after the Marshal took actual possession or custody or after claimants had notice of the libel, no maritime lien could be allowed to the claimants for services or supplies thereafter furnished to the vessel, and accordingly the claims of seamen and material men for services and supplies after such date were disallowed as liens (pp. 184, 185).

This case is not contrary to the settled *custodia legis* rule as seems to be suggested by the petitioner (Brief, p. 35).

The seamen's wages were not disallowed because the vessel was not navigating after her arrest and the claim for repairs was certainly not allowed as an expense of justice if by that petitioner means the keeping of the vessel in safe custody. No theory of a necessary expense of operation while in custody was involved and no such theory is supported by the decision. The Marshal has no right to operate. The statute requires him only to keep safely in his possession. He cannot, therefore, impress a lien for operation. Under a receivership, on the contrary, the Court has authority to order operation.

In *The Astoria*, 281 Fed. 619, the Circuit Court of Appeals for the Fifth Circuit held that seamen were not entitled to a maritime lien for wages accruing after the vessel was placed in the custody of the law, and that a supply man who furnished supplies for the crew while

the ship was in custody under the order of the Court to furnish them something to eat did not acquire a maritime lien as it did not appear that the crew remained on board under order of Court or rendered any service to the Marshal who was the custodian, and that if the crew remained on board and the Court acquiesced in it no maritime lien was thereby created, but that the supply man who furnished the food supplies could make an application for an allowance out of the extra month's pay awarded the crew under the statute.

In *The Culgoa*, 8 Fed. (2d) 62, District of New Jersey, Judge Bodine held (p. 63) :

"Obviously the libellant can acquire no lien for supplies furnished after the seizure of the vessel by the United States marshal in admiralty proceedings. See *New York Dock Co. v. S.S. Poznan* (D. C.) 297 F. 345."

In *The Commack*, 8 Fed. (2d) 151 (Southern Dist. Fla.), certain services and supplies were furnished the vessel on the order of the master after her seizure. Judge Call held that they could not constitute maritime liens notwithstanding ignorance of the lienors that the vessel had been attached, and that neither the master, owner nor Marshal could affix a maritime lien to any vessel after seizure under process; but that wages of seamen earned before the seizure of the vessel and supplies furnished before that date would be allowed as maritime liens, saying (p. 153) :

"I know of no principle of law which makes it the duty of the custodian to notify parties dealing with the master that he is custodian, and in the absence of such notice the claims for serv-

ices rendered or supplies furnished become maritime liens, or entitled to payment in priority to maritime liens."

In *The Jeanette*, 9 Fed. (2d) 408 (So. Dist. Fla.), the vessel was seized by the United States officials for violation of the immigration and customs laws and remained in their custody. Judge Call held that a maritime lien on a vessel could not be created by the master while she was in the custody of the law and that it was immaterial whether or not the owner abandoned the vessel; that he was powerless to create a maritime lien after the seizure of the vessel.

In *The Clarence B. Mitchell*, 1926 A. M. C. 1584 (D. C. Mass., Oct. 6, 1926, not officially reported), a vessel was libelled, arrested and a keeper placed on board by the Marshal on July 9th. On July 12th the keeper was withdrawn to save expense upon agreement of proctors. Subsequently certain repairs were performed on the vessel by one Green upon the order of the owner and the former master of the vessel remained on board upon the owner's agreement to pay him wages. Subsequent to the sale of the vessel petitions were filed by Green and the master for the services rendered to the vessel upon the owner's order, and with knowledge of her arrest. She was sold on August 28th. In denying the liens, Judge Morton said (p. 1585):

"It is a well-known principle of law that a repair man cannot have a maritime lien for work which he does on a vessel upon the order of her owner while that vessel is in Marshal's custody. This rule also applies to men working on the vessel

whether or not in the capacity of seamen. The evidence in this case shows that no orders were given by the Marshal or his duly authorized representative for any work to be done on the vessel. It follows, therefore, that so much of the claims of the intervening petitioners which are for materials furnished and services rendered between July 9, 1926 and August 28, 1926, must be disallowed."

In *Kjaer v. Etier*, 222 Fed. 243, 137 C. C. A. 659 (5th Circ.), the libellant's husband, a caretaker of a steamer in the custody of the Marshal, was killed by falling through an opening in the floor of the fidley. The Court held that the ship was in *custodia legis* and that the Marshal, representing the United States, was in possession, and that the owners owed no other duty than not to injure wilfully the decedent; that if the place was dangerous and ought to have been lighted, it was the fault and negligence of the Marshal and the owners were not responsible, referring to *The Esteban De Antunano*, 31 Fed. 920.

Petitioner (p. 31) attempts to distinguish the cases cited by the Circuit Court of Appeals in support of its ruling that when a "vessel is in *custodia legis* she is for the time being withdrawn from navigation and no lien arises for wharfage charges incurred during the period she is so withdrawn" (R. 154-157), and seeks to show that none of the cases support the conclusion reached. It criticises the use by that Court of the term "withdrawal from navigation" and attaches entirely too narrow a conception of the meaning of the phrase. It divides into three groups the cases cited by the lower Court on this question, but such classification is merely arbitrary for the reason

that the ground of petitioner's classification was not the ground at all on which the Courts decided the cases. The ground of decision was that the custody of the Court caused lack of authority in anyone other than the Court to bind the ship, and so it is immaterial whether in the various cases cited the navigation or maritime activity, if one chooses to call it such, has been terminated by the operation of the law, or by the parties, or whether the claim was for seamen's wages. We therefore pass over the cases of *The C. Vanderbilt*, 86 Fed. 785, *The Andrew J. Smith*, 263 Fed. 1004, *The Pulaski*, 33 Fed. 383, and *The Fortuna*, 206 Fed. 573, as all of these cases involve not at all the point which we are engaged upon.

In *The Estaban de Antunano*, 31 Fed. 920, and *The Mary K. Campbell*, 31 Fed. 840, petitioner solemnly states (p. 34) that as these vessels were levied upon under a state law and by a sheriff, they passed out of the admiralty and maritime jurisdiction, ceased to be ships competent to contract or individually liable for obligations, and went into the custody of the law as a mere chattel, citing *Taylor v. Carryl*, 20 How. 583. As we have already seen, there is no authority whatsoever for such a distinction under that case or any other. Whether the ship is seized by a state court or an admiralty court, the status is entirely the same. No authority has ever held to the contrary. She is as much a vessel as she ever was. No one has had the temerity heretofore to argue, so far as we can recollect, that a vessel's personality or characteristics are different in any way when she is seized by an admiralty court from what they are when seized by a state court.

The real point is that when she goes into the custody of the court, whether it be state or admiralty, there is a change in the power and authority to create liens.

There is no foundation either in authority or in reason for the statement by petitioner that what a sheriff pays for keeping a vessel in his custody is not wharfage. In *The Geisha*, 200 Fed. 865, 870, the Court specifically speaks of and describes it as "wharfage".

On page 34 of its brief, subdivision 3, petitioner refers to five cases stating that in each a maritime lien for seamen's wages after arrest was denied for the reason that the voyage was terminated because of the peculiarity of the seamen's contract and when the voyage was at an end, his occupation was gone, and that the maritime lien was denied from the date of the seamen's discharge or the abandonment of the voyage, and that if there were no sailing there could be no sailors' wages. We shall see from an analysis of these cases that petitioner is mistaken in the conclusions it draws. Its conception of the duty of a seaman is also faulty. After the vessel arrives in port he still has many duties to perform. This Court lately decided in *International Steredoring Company v. Haverty*, Oct. 18, 1926, 272 U. S. ——, 71 L. Ed. 22, 1926 A. M. C. 1638, that the word "seaman" used in the Merchant Marine Act of 1920 included longshoremen employed by stevedores while on a vessel, pointing out that the work upon which the longshoreman was engaged was a service formerly rendered by the ship's crew, and citing *Atlantic Transport Co. v. Imbrorek*, 234 U. S. 52, 62. Indeed, on the modern steamer the service performed by the crew while in port is often as important as that at sea.

The engineers and firemen have to maintain the fires, and keep steam on the boilers for heat, for running the auxiliary engines, winches for loading and discharge, dynamos, pumps, and for innumerable other purposes. The crew must do the necessary painting outside and inside, the repairing and overhauling of the engines and ship generally, and multitudinous things with which we are familiar. The officers must check and supervise receipt, stowage and delivery of cargo. The theory that without sailing there can be no sailors' wages is contrary to all experience. The sailor may be even busier while the ship is in port than he is while the ship is at sea. In fact, the mates are often busier in connection with the receiving and delivery of cargo, which frequently continues night and day.

In *The Augustine Kobbe*, 37 Fed. 696, there was no question of allowing the seamen a lien while the vessel was under seizure but as they were discharged when the vessel was seized and could have obtained other employment, they were not allowed further wages. What the Court decided was that one who supplied meat to the vessel after seizure, and after the discharge of the crew at the time of seizure, could have no maritime lien (p. 699), and that the mate, who remained on the vessel after her seizure and aided the Marshal in handling her, could have no maritime lien, whatever merit his claim might have as part of the Marshal's expenses. His claim of lien was not disallowed because he was a mariner and the ship was not sailing but because the ship was in custody and he was aiding the Marshal (p. 701).

In *The Erinagh*, 7 Fed. 231, the master of a bark contracted for a watchman on September 24th. The

ship was armed under a letter by the Marshal on October 29th. It was held that the claim for the watchman's services after October 29th was properly discontinued; that his contract was for his services during the state of things existing at the time he was employed, and that that state of things was terminated by the discharge of the cargo and returnment of the vessel; that there was no necessity for the watchman after his seizure by the Marshal, and that if the watchman did not discover that the vessel was in the custody of the Marshal, it was his own fault. There was no question of a seaman's lire in that case. There was a question as to whether the master would be allowed a sum under foreign law for his wages and it was held that they would be proportioned to the sum of the watchman's services before the seizure, one sum giving the master no lire.

The Astoria, 288 Fud. 616, ruled by permission, dealt not only with crew's wages but also a sum for supplies while the ship was in custody. From the wages claim the Court said (p. 621):

"From the outset, we are of opinion that there can be no question here of sum of the crew for wages after the vessel was placed in the custody of the law, except for the value which the wages entailed by statute, and that the master in this case should be paid accordingly. The *Barbara de Jefferson*, 18 U.S. 28 Fud. 920; *The *Baptista Robbe**, 18 U.S. 37 Fud. 930; *The *Piedmont**, 18 U.S. 2000 Fud. 933; *The *Castilia** 18 U.S. 2000 Fud. 936."

As to the claim of the Panama Canal for advances for food supplies for the crew under an order of the Court to furnish them something to eat, the Court said:

"The Panama Canal, by complying with this order, did not acquire a lien. It does not appear that the crew remained on board the vessel under orders of the Court, or that they rendered any service to the Merchant, who became succeeded and was incorporated therewith. If the crew remained on board, and the Court acquiesced in it, no maritime lien was thereby created" (pp. 125, 126).

The holding that the acquiescence of the Court in the crew remaining on board or in furnishing supplies would not give a maritime lien, is a further answer to petitioner's argument that Judge A. N. Hand's order of January 5, 1923, who in some way an acquiescence of the Court in the remaining of *Albatross* to the vessel.

The question will be distinguished the cases cited by the Circuit Court of Appeals on the ground that for one reason or another the vessel in those cases was relieved from responsibility for "maritime activities" and the cargo was not up. It is submitted, however, that the *Albatross* was relieved from maritime activities quite as definitely as the vessel in the cases cited. The voyage of the *Albatross* was from New York to Manzan to deliver cargo there. When she failed to deliver it and returned to New York she abandoned her cargo as definitely as she ever could have.

Petitioner argues, p. 37, that its agreement with the United American Corporation for the use of Pier 6 was anything different from the ordinary lease of a pier. The

question is not important, in our opinion, but as such stress is laid on it we should point out that under the contract between the petitioner and the Polish Company the Polish Company agreed to pay for the use of the pier \$250 per day from 7 A. M. on December 1, 1920, and up to the time the steamer and all cargo were removed, and in addition a sum for lights and for cleaning the pier and carting away rubbish. If this was not a lease or ordinary hiring of the pier from 7 A. M. December 1st up to the time the steamer and cargo were removed, then we must do violence to plain language, for the hire had to be paid whether the steamer arrived at 7 A. M. on December 1st or not, and was due just the same from that time even if she had not arrived until the 15th of December. As a matter of fact she did not arrive until after December 1st, and yet the Polish Company was billed from the morning of December 1st. The very bill which petitioner sent to the Marshal contained charges from December 1st at 7 A. M. The contract was therefore not for the wharfage furnished to the vessel but was a hiring of the pier from December 1st until the vessel and cargo had left, no matter when the steamer arrived or when she left. The cleaning of the pier, the furnishing of the lights, the carting of the rubbish were all for the benefit of the ship owner or the cargo owner and not for the benefit of the ship.

Petitioner argues (p. 39) that respondent has adopted the rule of law contended for by petitioner on the ground that the Court held in *The Poolean*, 276 Fed. 418, 435, that the libellants could recover damages for breach of the contract of affreightment and for negligence in the

discharge of the cargo. What the Court actually decided was that the libellants were entitled to receive the difference between the value of the shipment at the time it should have been delivered at Havana and the value at the time it was delivered in New York. The cause of action and the lien arose when the *Poznan* abandoned her voyage by leaving Havana as the Court held on page 431. It points out that part of that damage might be due to negligent stowage before starting from New York and part due to pilferage during loading or during discharge, and part due to breakage during loading and discharge, but those were merely incidental elements of the total difference in value which the Court awarded. The suits and the liens sustained were for breach of contract to deliver. No question was raised as to whether these incidental elements were proper elements of damage, because the vessel was in the custody of the Marshal; nor would an incorrect decision on that point in another case warrant an erroneous one in the case at bar.

C. A MARITIME LIEN ARISES ONLY AS AND WHEN THE SERVICES ARE RENDERED.

The District Court held that the contract of the New York Dock Company with the Polish-American Navigation Corporation could not create any lien after the Marshal once took charge; that if a lien ever arose, it ceased on December 2nd; and that the contract ceased to control as soon as the Marshal took possession (R. 38).

This particular point was not specifically dealt with in the opinion of the Circuit Court of Appeals and the

petitioner now contends in Point V of its brief that the arrest of the vessel did not terminate the lien, which it contends arose a few minutes or hours before, when the vessel arrived at the wharf. The contention is that the lien for wharfage, if once created, survived the arrest of the vessel and continued so long as the vessel received the wharfage service.

The cases cited in support of this contention have no reference to the conclusion sought to be predicated on them. There is not any proper analogy between the undoubted doctrine that a maritime lien is a *jus in re* good against innocent purchasers without notice, and the theory advanced by the petitioner that a maritime lien day by day continues to arise after arrest by virtue of a contract or arrangement made prior to arrest.

The contention of the petitioner is contrary to the principle underlying the cases already discussed holding that the owner cannot create a lien on a vessel *in custodia legis*. At least three of these cases, however, show not only that a lien cannot arise after the vessel is taken into custody, but also that supplies or services giving rise to a lien before arrest will not support a lien insofar as they have been furnished after arrest, though under the same contract.

In *The Rupert City* (1914), 213 Fed. 263, 271, exceptions were filed to the finding of the special commissioner that the master's wages terminated on the date that the vessel was taken into custody by the United States Marshal. The master was in an exactly similar situation to that of the petitioner in this case because he continued to act after arrest in accordance with his pre-existing contract as master. The Court affirmed the

finding of the commissioner on the ground that the control of her owners over the vessel ended upon seizure by the Marshal, and their power and the power of their agents to encumber her with liens necessarily ceased.

In *The Commack* (1925), 8 Fed. (2d) 151, numerous interventions setting up maritime liens against the proceeds of the vessel were filed and referred to a special commissioner. One class of intervenors filed exceptions to the commissioner's allowance to lienors for services and supplies insofar as they were furnished subsequent to the attachment of the vessel by the Marshal. On these exceptions, the Court held that all claims for services and supplies furnished after the seizure of the vessel are not maritime liens and that their payment must be postponed until all maritime liens were paid.

The Court further held in that case in respect of a claim by one of the intervenors for money advanced to pay seamen and for supplies and stevedoring services, that such intervenor had a lien only for such sum as was advanced to pay the wages of seamen earned before the seizure and to pay for supplies and stevedoring services furnished before that date. The criterion by which the Court determined whether or not a maritime lien existed was not the time when the contracts to serve as seamen or to furnish the supplies and services were made, but the time when the services were actually furnished.

In *The Astoria* (C. C. A., 5th, 1922), 281 Fed. 618, 621, a maritime lien was asserted for wages arising out of shipping articles entered into before, and the term of which expired after, the vessel was seized by the Marshal. Insofar as wages accrued after seizure by the Marshal a

lien was denied. The crew were allowed an extra month's wages, not on the ground that they were earned after seizure, but that the right to such extra wages accrued before seizure by the Marshal.

In *The Irages*, 283 Fed. 445 (S. D. Fla.), seamen libelled the vessel for wages which accrued part of the time before the vessel was taken in custody by the Marshal and part of the time thereafter. No showing was made of services rendered to the Marshal. Judge Call held that there should be no recovery for wages subsequent to the attachment of the vessel (p. 446).

In *The Bethlehem*, 286 Fed. 400, 402, libels were filed for wages against the *Bethlehem* for services performed partly before and partly after the attachment of the vessel by the Marshal. The Court held that no lien could be allowed for that part of the wages which accrued after the attachment of the vessel by the Marshal.

D. THE WHARFAGE DID NOT ACCRUE UPON THE ORDER OF THE COURT OR UPON THE CONSENT OF THE RESPONDENT.

We have shown that no lien ever arises for wharfage against a vessel or her proceeds while she is in *custodia legis*, except when furnished as a necessary incident to the prosecution of the suit and upon the Court's order.

Petitioner again mistakenly assumes that it was by consent of respondent and by order of court that the *Poznan* was permitted to function as a vessel by discharge and delivery of her cargo at petitioner's wharf. All that Judge A. N. Hand did was for the time being not to interfere in the dispute between the charterer, the owner and some of the shippers, which had ended by the time the

Court made its order. In the possessory suit of A. M. Capen Sons, the Court merely ordered the delivery of the cargo by the charterer, not specifying whether it was to be on any dock or into lighters. It was immaterial to the Court or to Capen whether the cargo was discharged on petitioner's wharf or some where else. It was the duty of the charterer to find the place. How then was it in obedience to such two orders that the *Poznan* remained at Pier 6? As we have seen, it is not customary and would have been unnecessarily harsh for the Court or the consolidated libellants to have interfered as long as the safety of the vessel was not threatened.

The hearing in chambers on January 5, 1921, cannot have any bearing upon this question. In the first place, the petitioner was not a party to the motion and did not attend. It could not be bound by any order of the Court and therefore by familiar rules could take no benefit therefrom. Both the stipulation of January 20th, 1923 (R. 27) and the order to show cause (R. 28) and the affidavits on which it was based (R. 29-35) and the order entered thereon (R. 36-37) plainly show that the application was not made in the consolidated libel brought against the vessel for a breach of contract but in the possessory libel brought by A. M. Capen's Sons, Inc., against the bundles of wrapping paper and the Acme Operating Corporation for possession of its shipment and not against the *Poznan* at all, and that notice was only given to such parties as had intervened in such possessory libel and not to the consolidated libellants. It is not shown what members of the Shippers' Committee were there except Mr. Day, part of whose cargo was on the dock and part on the vessel. Petitioner states in its brief (p. 29) that it was upon the request of the respond-

ent herein, with other cargo claimants, that the Court denied the application of the charterer for an order requiring the owner to remove the vessel from Pier 6 (R. 36). We find no such evidence on that page. The order entered recited proof of due service upon Hunt, Hill & Betts, proctors for the libellant, who was A. M. Capen's Sons, Inc., and upon certain other proctors for intervening shippers. Nowhere is the name of the John B. Harris Company mentioned. Indeed, it is difficult to see how Hunt, Hill & Betts, as proctors for A. M. Capen's Sons, could have objected for the reason that the order for the delivery of this paper by the Acme Company in the possessory suit was entered on December 11, 1920, and recited that the paper was then being discharged (R. 16) and as the order of the District Court affirming the taxation of the Marshal's fees recites that the bales of paper of respondent were bonded and removed within 48 hours after the attachment (R. 23), from which it may be conclusively inferred that such cargo had been long since received by the respondent. Moreover, at the meeting at Judge A. N. Hand's chambers the order shows (R. 36) that Hunt, Hill & Betts, as proctors, made no objection to the moving of the vessel, as may be easily understood from the fact that many of the possessory libellants had no interest in the vessel remaining at Pier 6, and this, of course, explains the attendance of members of the Shippers' Committee who could themselves state their various preferences.

The order itself shows that on the hearing the Acme Operating Corporation abandoned its motion for the time being and all parties agreed that the discharge should stop for one week, with no decision as to what should be subsequently done with the vessel.

The best evidence as to whether the consolidated libellants or the Marshal consented to or objected to the wharfage claimed by petitioner is found in the order entered in the District Court sustaining the decision of the Clerk on the taxation of the Marshal's fees that such claim was not a proper expense of the Marshal. This order shows that the consolidated libellants objected to the claim on the ground that the Marshal had made no arrangement with the petitioner for such wharfage but that petitioner had made it with the ship owner and had accepted payment on account from the owner, and the owner's note not then due for the balance of its bill (R. 23). This order was made almost a year and a half after the consent order of Judge A. N. Hand, which petitioner now claims was a consent to its wharfage claim by the consolidated libellants. Yet on such evidence as this, petitioner bases its claim that its bill for wharfage was by order of the Court and on the consent of the consolidated libellants. Nowhere on the moving papers, nor on the hearing, was any mention made of petitioner's claim for \$250 a day or that whatever agreement the Polish-American Company had with petitioner was not being duly carried out. Can it be said that under these circumstances a full and fair disclosure of the facts was made to Judge A. N. Hand as to petitioner's claim or that he had any idea, when he made his order on consent, that he was encumbering the ship with a preferred claim for wharfage to the extent of \$250 a day? What can be said about the period from December 2, 1920 to January 5, 1921? Could such order on January 5th, have any effect in impressing a lien for petitioner's claim for such period? What about the period after the ship was entirely discharged on February 18, 1921, or after the

cargo was all removed from the dock on March 11th, 1921? Could the order of Judge A. N. Hand have any bearing on such periods? We have gone into this meeting at Judge A. N. Hand's chambers thus fully because repeatedly in its brief, petitioner makes statements that its wharfage was furnished by the consent of the consolidated libellants and upon the order of the Court. When the facts are carefully examined it is seen that the force of this contention vanishes.

What *The Young America*, 30 Fed. 789, cited by petitioner (p. 30) really held was that the rule that liens upon vessels cannot be acquired while they are in custody is not applicable to an arrest formal only, when by consent of the parties the Marshall does not keep her in custody or put a keeper on board, or post a notice on her, or publish the process, but she is re-delivered to the owner and allowed to engage in her usual business about the harbor and to incur maritime obligations toward third persons having no notice of her arrest, as we have seen.

POINT II.

Petitioner's claim of a lien for wharfage furnished the *Poznan* while she was in *custodia legis*, as an expense of justice, is not sustained by the facts, or by the authorities.

A. PETITIONER'S SERVICES WERE NOT RENDERED FOR THE PRESERVATION OF RES.

Petitioner argues in its brief, Point I, page 10, for a lien for its enormous claim for wharfage for ship and cargo, as an expense of justice, meaning the expense of the Court in preserving the subject-matter of the suit pending the bonding of the vessel or the termination of litigation. But as we have seen such a charge can only be created as part of the Marshal's expenses by agreement of the Marshal and can only be a lien by order of the Court.

In this case the vessel was not placed at the wharf by the Marshal but by the owner of the vessel for its own purposes and when the matter was brought to the Marshal's attention he expressly notified the petitioner in writing that he would not be responsible for any such charges. As no application was made to the Court to fix the rate of wharfage or make it a lien, it is difficult to see how the petitioner's claim could be sustained on the theory that it was an expense of justice. The mere facts that the vessel owner was interested in getting the cargo discharged under its contract with the petitioner and that many of the possessory libellants were interested in getting their cargo, though some of them were not consolidated libellants against the ship, would not make petitioner's enormous claim an expense of justice for the ship.

When the vessel was moved from Pier 6 to the

wharf which the Marshal himself contracted for she was berthed for safekeeping at the rate of \$29.49 per day (the legal rate in New York) (R. 20).

We need cite no authorities to prove that the purpose of the seizure by the Marshal is the preservation of the vessel pending the litigation and its ultimate determination. His sole duty is to take her into custody and to keep her safely during that time. He is not obliged to exclude the owners' crew or to prevent loading or discharging under agreements made by the owner with other parties, provided such action does not interfere with the safety of the vessel or with his custody. It is safe to say that in the vast majority of cases where vessels are libelled and put in the Marshal's custody, the Marshal never interferes with any arrangements for wharfage made by the owner of the vessel or with any of the owners' engagements, because as a rule they do not affect the vessel's safety. The wharfinger is glad enough to look to the owner for his wharfage, knowing that he cannot impress any lien on the ship while she is in the Marshal's possession.

B. PETITIONER'S CASES DO NOT SUPPORT ITS CONCLUSION.

In *Tucker v. Alexandroff*, 183 U. S. 424, 438, the language of this Court quoted by petitioner was used in pointing out the difference between the status of a ship before she was launched and thereafter, which was the real point at issue.

In *The Phebe*, 1 Ware (354), 360 Fed Cas. 11065, relied upon by petitioner in Point I, the only question before the Court was whether, in case of the sale of a vessel on Marshal's sale, he was required to pay into the registry all of the proceeds of sale less the expenses

of sale, or whether he could first deduct from the proceeds his expenses for care and custody of the vessel. In that case the report shows that the Marshal appointed one Abbott, keeper of the *Phœbe* and expressly authorized him in writing to keep her safely at some safe and convenient wharf (p. 361). The keeper presented a bill for the wharfage which he incurred in this way, which the Marshal considered exorbitant and later had reduced, but in paying the proceeds into Court he deducted the reduced wharfage and other expenses. The Court simply held that he had no right to do this. The Court was dealing with a case where the Marshal's representative was expressly authorized to contract for the wharfage. It did not suggest in any way that a lien for wharfage could arise on a vessel in custody where the wharfage was contracted for by the owner and not the Marshal, or that such wharfage could be called an expense of justice; all of which appears from the extract quoted in petitioner's brief, pages 17, 18, and is made even plainer by the rest of the paragraph of the opinion, as follows:

"Nor is there any hardship in qualifying his lien in this way. She was under arrest on legal process, and he need be proximate to them, for no one can plead ignorance of the law, that his claim for wharfage, like all other claims against the vessel, must be presented to the Court for allowance before it could be paid.

It is further said that the charge in this case is reasonable and moderate, and that if the money were paid into the registry, the Court would immediately order it to be paid out again on the same charge. The answer is, that the Court had no opportunity of informing itself whether it be so.

entitled and authority of law; and it will not be
gratuitous, it being a charge on the property which
consists in the possession of the land and which
is not in the custody of the law, that it is prob-
ably the duty of the Crown to be satisfied that it
is reasonable and proper to be paid before the
claim be allowed." *The Post, 1891, 1 March*
1891, Vol. 1, No. 11, p. 26.

The particular case you quote is to be applied in support of
the contention that the case of *The St. Paul, 1891 Post 200*,
is exactly in point with the one at bar. By a former
resolution it appears that the Bench of the Court
of Appeal of Alberta for the Second Circuit has held and
decided *The St. Paul case* and the case at bar, that con-
cerned of exactly the same claim: namely, Rogers, House
and Weston, and that the opinion is fully there given
therein. Those judges may be assumed to have had
complete facts before them and what they decided. What
the Court will say Rogers, C.J., in his opinion to apply
to the question which he提出的 is that of proportion
between cause and consequence, especially as the claim will
lie in the words in *The St. Paul* and the facts
submitted:

"That counsel for the appellants in the *Post*
case in this Court said in all their briefs that the case
is that, and nothing more than the facts follow. As
it stands in all cases with any such construction
there is nothing in *The St. Paul case* which would
amount to the damage now complained of. The
plaintiffs claim the Plaintiff judge required in his
opinion that, because of being so far removed from
the place which was located in *The St. Paul*, so
especially the one which was not possessed of

litigated, or decided in that case. The wharfage in that case was incurred pursuant to an order made by the Court and with the consent of all the libellants. It was made in the only way in which a maritime lien can be (fol. 220) validly created against property in *custodia legis*, namely, by an order of the Court. The assignment of errors in *The St. Paul* contained no reference to the subject of a lien either maritime or equitable. And an examination of the briefs shows that no question of any kind of lien was in any way discussed therein. There were but two questions before this Court in that case. One was whether this Court could entertain the appeal. The other was the amount of wharfage to be paid and for what period. There is nothing whatever in the opinion as to an equitable lien. The only reference to a lien contained in the opinion is in the following paragraph, which explains why this Court thought it had a right to hear the appeal:

"The method here pursued is without precedent, and not to be approved as such; but we feel justified in treating the claim as it was below, *viz.*, as a demand for preferential payment, or as an asserted superior lien on the proceeds of the steamship. Consequently a final order refusing (in part) such payment out of, or lien upon, a fund in the registry is the subject of appeal. *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157" (R. 161-162).

The St. Paul had loaded a cargo and anchored in New York Harbor without sailing, for a long time. She was libelled by many cargo owners for failure to proceed and taken into custody by the Marshal in April, 1919.

On May 27th, the vessel and cargo were damaged by fire, necessitating beaching, and after she was raised a libel was filed by salvors against the ship and cargo. After reciting the circumstances generally and specifying that in order to preserve the vessel and cargo from further damage, and in order to permit a sale, it was necessary to remove the cargo, an order was entered which provided:

"ORDERED, that the Marshal of this Court be and he is hereby authorized to permit the said Hudson Navigation Company to move the said steamship *St. Paul* from her present anchorage to Pier 32, North River, and to make an arrangement with the said Hudson Navigation Company for the discharge of the said cargo, at Pier 32, North River, the amount of the cost of discharging, storing and caring for the cargo to be subject to the approval of the Court, the said Hudson Navigation Company to look to the said cargo for the payment of the cost of said discharging" (271 Fed. 265).

It is evident from the foregoing that the priority of the Hudson Company's claim for wharfage, afterwards enforced by the Circuit Court of Appeals, was created by the Court on consent of all the interested parties.

On July 17th, discharge was completed, but the *St. Paul* was not removed to another berth until October 8th, and, in the meantime, more or less cargo remained on Pier 32.

On August 5, 1919, an order was entered permitting "the various owners of cargo" to "withdraw their cargo from the custody of the Marshal" on terms which would produce a fund wherewith to pay Hudson Company for unloading and caring for the goods. By the same order

it was referred to a Commissioner to ascertain what should be paid to Hudson Company. *The St. Paul*, 271 Fed. 265.

Before the Commissioner, the Hudson Navigation Company claimed wharfage from July 17th to October 8th, as a lien under the order of June 11th. There was no dispute whatever that the wharfage and similar items were prior liens. These items up to July 17th were actually paid by the cargo without protest. Indeed, in view of the orders of June 11th and August 5th, it is difficult to see how the cargo could have made even a colorable objection to the priority of such charges. The consolidated libellants, however, resisted the allowance of any wharfage and similar items beyond July 17th. The Commissioner held that on July 17th, the berthing of the ship ceased to be a charge against the cargo; but he allowed a charge against the cargo for the use of the pier. The Commissioner's report was confirmed "by an order not complained of", 271 Fed. 266, which shows clearly that the question of lien was not in dispute or before the Appellate Court.

Thereupon the Hudson Company submitted to the United States Marshal a bill for wharfage at Pier 32 from July 17th to October 8th, which the Marshal inserted in his bill of costs against the fund produced by the sale of the vessel. On appeal from taxation, the District Court allowed the wharfage claim from July 17th to August 7th and disallowed all later wharfage. From this decision the Hudson Company appealed.

The Circuit Court of Appeals affirmed the order on the ground that the amount of the award was sufficient, although disapproving of the reason for the decision below.

That Court held that the charges were not in any

case properly taxable as Marshal's costs or disbursements, but in accordance with the attitude of the parties treated the claim as one for services rendered the ship of a kind which might have been enforced by proceedings *in rem* or by petition against the proceeds, that is, as a demand for preferential payment or as an asserted superior lien on the proceeds of the steamship.

That case is clearly distinguished from the present one by the following circumstances which are absent in *The Poznan*: First, the wharfage was incurred on the application or at least with the consent of the consolidated libellants and by the specific order of the Court; secondly, the order of the Court made the entire cost of discharging the vessel a charge in favor of the Hudson Navigation Company; thirdly, the cargo was in the custody of the Marshal and as one of the terms of permitting the cargo to be withdrawn from the custody of the Marshal, the order of August 5th placed on the cargo terms which would produce a fund with which to pay the Hudson Company for unloading and caring for the goods; and fourthly, the contract under which the *St. Paul* was brought to Pier 32 and under the terms of which she remained there, was a contract made between the Hudson Company with, or by the direction of, the Court.

The most important distinction, however, is in the issue presented to the Appellate Court, which in *The St. Paul* was only *quantum* of recovery and not priority of lien.

In the present case, the District Court held that a lien on the lienor's lien was created apparently by operation of law and that such lien was enforceable against the proceeds of the sale of the *Poznan*. That question is precisely the one which was not disputed or litigated in *The St. Paul*, where the Court and all the parties were in

agreement that wharfage, as one of the discharging expenses, was to be paid out of the fund in Court and was to have priority.

The Court held that there was no reason why the *St. Paul* should have been kept at an expensive pier after she was discharged, as then it was merely a case of preservation of the vessel; that the wharfage charge must be reasonable for the *St. Paul*, not for Pier 32 under ordinary conditions; and that what it cost to berth the *St. Paul* at an open pier after she was taken away from Pier 32 was evidence of what a reasonable charge was. As the lower Court, already had awarded \$2,625 for the first 21 days, the Circuit Court of Appeals held that at a reasonable rate such sum was sufficient to cover wharfage for the whole period, and that if anything the Hudson Company had been overpaid. This is all that was decided by the *St. Paul* case, and is direct authority for the proposition that the only wharfage that could be allowed for the *Poznan* was the open wharfage rate of \$29.49 per day at which she was berthed after leaving Pier 6, and that any claim for a greater rate should have been based on an application to the Court on all the facts to enable it to make an appropriate order, deciding what the rate should be and what, if any, charge should be made upon all the cargo instead of cargo of only the consolidated libellants.

The quotation from *The America*, 2 West Law Month. 279; Fed. Cas. 288, found on page 18 of petitioner's brief, dealing with the *Phebe*, *supra*, is meaningless so far as the issues in this case are concerned, for as we have seen in *The Phebe*, the Marshal expressly authorized his keeper to take the vessel to a wharf and he did so, arranging for the wharfage. The sole question in *The*

America was the priority of different liens that arose on the vessel. There was no question as to a lien on a vessel in custody.

The Free Trader, 1 Brown, Adm. 72, Fed. Cas. 5091, quoted from on page 18, is, when examined, found to be an authority sustaining the respondent's position in the case at bar. *The Free Trader* was seized by the Marshal and sold. By his return he charged \$106 for custodian fees. No vouchers were filed showing payment and no agreement by which he was obligated to pay the same. It is true the Court said, as quoted by the petitioner, that the Marshal was entitled to the necessary expenses which he paid or obligated himself to pay, and no more, but it went on to say:

"It must be established by vouchers or otherwise to the satisfaction of the Court, and cannot be paid except by order of the same."

In *The F. Merwin*, 10 Ben 403, Fed. Cas. 4893, cited by petitioner at page 19, the holding by the Court was entirely in accordance with the respondent's position in this case. There the reasonable and necessary expense of wharfage was actually incurred by the Marshal and paid by him, and it was a question whether it was a proper expense of custody. The Court, per Choate, J., said at page 407:

"The Marshal as the actual custodian of the vessel, especially if the owner or master leaves her, would be bound to use reasonable efforts to protect the vessel from danger, while in his custody, as, for instance, to move her in case of fire, or to use proper endeavors to put out a fire." (Italics ours.)

The case of *The Allegheny*, 85 Fed. 463, cited on page

18, has no bearing on the questions at issue here. The Court simply held that, as every admiralty practitioner knows, the reasonable expenses incurred by the Marshal for the safety of the vessel could be ordered paid by the Court before final decree. As a matter of fact, in that case the vessel came into the custody of the Marshal in such a damaged condition that to keep her afloat he did incur considerable expense in preserving the property.

The case of *The Norelty*, 9 Ben. 195, (Fed. Cas. 10368), cited and quoted from by the petitioner (pp. 21, 22), is not in point. Petitioner states (p. 21):

"In sustaining a libel *in rem* for the dockage, District Judge Benedict said: * * *"

This is undoubtedly an unintentional mistake. An examination of the report shows that no libel *in rem* whatsoever for the dockage was filed, and there was no question of lien on a vessel either in custody or out of custody involved at all. It was the ordinary application for the taxation of Marshal's fees.

As the Marshal himself made the application for leave to pay the charge, it may well be assumed that he made arrangements for the service.

C. PETITIONER'S CLAIM OF \$16,962.03 FOR WHARFAGE, CLEANING AND DIRT REMOVAL WAS PROPERLY STRICKEN FROM THE MARSHAL'S BILL OF COSTS AND FEES.

Section 829 R. S. provides Marshal's fees,

"for the necessary expenses of keeping boats, vessels or other property attached or libelled in admiralty, not exceeding \$2.50 a day" (4 Stat. 678).

The Act of June 1, 1922, c. 204, provides:

"There shall be paid hereunder any necessary cost of keeping vessels or other property attached or libelled in admiralty in such amount as the court on petition setting forth the facts under oath may allow" (42 Stat. 615).

The change in statute was apparently made in order to permit the Court to allow a greater charge than \$2.50 per day for keeping in custody. The important thing about the statute is that the Marshal has absolutely no right to exceed the amount of \$2.50 per day except upon order of the Court after showing the facts.

The strict limitation upon the power of the Marshal to incur expenses in connection with vessels in custody, even though by incurring same the fund from the sale will be increased, is well illustrated by the case of *The John E. Mulford*, 18 Fed. 455. In that case Judge Brown held that the Marshal is not even authorized to employ an auctioneer on a sale under process in admiralty "at the expense of the parties or of the property or as an incumbrance upon the sale or a charge against the purchases, * * * No auctioneer is required by law upon sales by the marshal, and the latter can make no charges except such as the law expressly authorizes" (p. 456). Under this statute if the Marshal himself had taken the *Poznan* to Pier 6 and expressly contracted for wharfage services, such contract would have been illegal and unenforceable because the \$250 daily charge was based on the facilities for storing and delivering the cargo and greatly in excess of the current rate for berths for safekeeping.

Petitioner argues (pp. 19, 20) that even though the Marshal disclaimed liability for payment of wharfage

(R. 12, 13) and the Circuit Court of Appeals gave weight to such disclaimer (R. 158), still he afterwards acknowledged liability by including such wharfage in his bill of expenses. The agreed statement of fact, however, states (R. 13) :

"The New York Dock Company requested the U. S. Marshal to include *its said claim* as part of the bill of costs submitted by the Marshal which was done by the Marshal." (Italics ours.)

And it also appears (R. 13) that this item was struck out by the Clerk and by the Court upon objection by libellants and the affidavits of the Marshal and his deputy (R. 25, 26) showing that at no time did they enter into any agreement with the New York Dock Company or make any request to have the SS *Poznan* moored at any of its piers or agree to pay for any such wharfage.

Petitioner argues that no express contract by the Marshal was necessary. He expressly disclaimed any responsibility. How could any implied agreement be inferred? Petitioner points to no evidence. It argues that the Marshal had no more right to keep the *Poznan* at the petitioner's wharf than any private owner; but the petitioner already had a contract with the Polish Company, her owner, that the *Poznan* should be kept at the wharf during her whole discharge, and that was the only contract that petitioner ever had for its wharfage. The Marshal merely took her in custody where he found her, and as we have seen, would not change her location unless it were unsafe or unsatisfactory, or for some other good reason. If the owner and petitioner were satisfied, what excuse could he have to interfere with a contract never terminated or disaffirmed while the *Poznan* was at

Pier 6? Petitioner argues that if the Marshal had paid he would have charged the amount in his bill. But as we have seen from *The St. Paul*, the Court would never have allowed him such an exorbitant sum for wharfage. Petitioner continually refers to the so-called "use" of the wharf by the Marshal. But how did he use it? It was the owner who used it as a berth to discharge cargo.

Moreover, the order confirming the Clerk's action in striking out the wharfage item from the bill of costs was not appealed from by the petitioner, and it is doubtful from Judge Hough's opinion in *The St. Paul* whether such an order is appealable. In *Canter v. The American Ins. Co.*, 3 Peters 307, this Court held that an order dealing only with the allowance of costs is not appealable in admiralty. It cannot be reviewed on this appeal because the question was not dealt with on the trial now to review herein. It was a different hearing at a different time, and no exception or assignment of error was ever taken to the order.

Petitioner argues that had respondent been dissatisfied with what the Marshal did with the vessel, its proper course was to apply to the Court for relief and that on the contrary the respondent opposed the removal of the vessel. There is no evidence whatever that the respondent in this case had anything to do with opposing the removal of the vessel, or that it had any reason to oppose such removal. The only persons who could have opposed it would have been those whose cargo was partly on the vessel and partly on the wharf at the time, as we have seen. But why should the respondent be dissatisfied with what the Marshal did, or why should the respondent apply to the Court? If anybody could have been dissatisfied, it would seem from the plaints of the petitioner that it

was the one. But it never applied to the Court for relief or for the fixing of a lien for reasonable wharfage.

POINT III.

Having no maritime lien, petitioner cannot recover in this action on any other theory.

The District Court having correctly found that the petitioner did not have a maritime lien for the charges in question allowed a recovery on the ground that the wharfage and other charges constituted an equitable lien or charge upon the respondent's maritime lien. This view was thoroughly and adequately disposed of by the Circuit Court of Appeals (R. 161-166).

While conceding in Point VI of its brief that it was not entitled to an equitable lien, the petitioner still seeks in other parts of its brief to reassert in substance the result in the District Court by describing its alleged right as a "right to preferential payment from the proceeds on equitable principles" (Brief, p. 56).

This change in terminology does not alter the fact that the petitioner's position is ultimately based on a right which involves changing the legal relations of parties to property in a way that is done only by a court of chancery, and hence is not within the so-called equity function of an admiralty court. Moreover, the petitioner has not shown any sound basis for an equitable right of any kind.

A. THE EQUITABLE RELIEF SOUGHT IS NOT WITHIN ADMIRALTY JURISDICTION.

1. *A non-maritime claim cannot be charged against the general proceeds but only against the remnants and*

surplus. This term means the unappropriated remainder of the proceeds after payment of maritime claims. *Benedict, Admiralty*, 5th Edition, Sec. 453.

The power of the admiralty court to dispose of the proceeds of the vessel extends to the payment of non-maritime liens only after maritime liens have been satisfied. *The Latawanna*, 1874, 21 Wall. 558; *The Ada*, C. C. A. 2nd 1918, 250 Fed. 194, 195; *The Atlantic City*, C. C. A. 3rd, 1915, 220 Fed. 281.

In the present case, as the undoubted maritime liens far exceed the entire proceeds of the vessel (R. 10) there are not any remnants and surplus against which this claim may properly be enforced.

2. *The proceeds of a vessel may be distributed only to those having specific liens thereon.*

While the admiralty court has power to distribute the surplus funds after payment of maritime liens to all those who can show a vested interest therein, in the order of their several priorities, a non-maritime lien will be denied if any technical defect exists therein. *The Latawanna*, 1874, 21 Wall. 558; *The Edith*, 1876, 94 U. S. 518; *The Willamette Valley*, 1896, 76 Fed. 838; *The Belize*, 1887, 52 Fed. 414; *The Ada*, C. C. A. 2nd, 1918, 250 Fed. 194; *The Atlantic City*, C. C. A. 3rd, 1915, 220 Fed. 281; *The Lydia A. Harvey*, 1898, 84 Fed. 1000; *Miller v. The Peerless*, C. C. Fla. 1891, 45 Fed. 491.

3. *Services rendered to the lienors or to their property do not give rise to a lien or charge on the proceeds of sale.*

The District Court found the petitioner entitled to "an equitable claim on the fund, 'though not a maritime lien on the ship', and in priority to the lienors to protect

whose liens the services were rendered" (R. 38). It also appears in the Supplemental Opinion (R. 40) that the lien allowed by Judge Hand against the fund was based on an equitable claim against the lienors—"a lien on their liens". Such an attempt to impose "a lien on their liens" was unsuccessful in *Sheldrake v. The Chatfield*, 1892, 52 Fed. 495, and in *The Neptune*, C. C. A. 2nd, 1921, 277 Fed. 230, 231.

4. *There is no jurisdiction in admiralty to enforce a right which is purely equitable and does not give rise to a maritime lien.* While an admiralty court acts upon equitable principles, it is not a court of equity and has not any equitable jurisdiction. It cannot change the legal relations of parties to property in the way that is done by a court of chancery. *The Willamette Valley*, 1896, 76 Fed. 838, 844; *The Albert Schultz*, 1882, 12 Fed. 156; *The Ada*, C. C. A. 2nd, 1918, 250 Fed. 194; *Davis v. Child* (Me.), 1840, 2 Ware 78, Fed. Cas. No. 3628; *The Eurana*, C. C. A. 3rd, 1924, 1 Fed. (2nd), 684; *Hill v. The Amelia*, S. D. N. Y. 1873, 6 Ben. 475, Fed. Cas. 6487; affirmed by the Circuit Court 1877, 23 Fed. 406, note; *Kellum v. Emerson*, C. C. (Mass.) 1854, 72 Curt. 79, F. C. No. 7669.

B. NO EQUITY EXISTED IN FAVOR OF THE PETITIONER AS THE RESPONDENT WAS NOT UNJUSTLY ENRICHED AT ITS EXPENSE.

The interest of the lienors as such should not be identified with that of the cargo. Some confusion appears to have resulted from the dual nature of the consolidated libellants' interest; first, as owners of the cargo, and second, as holders of maritime liens against the *Poznan*.

Of course, their interest as cargo owners cannot be affected in this proceeding which is against the ship and her owners and not against the cargo. The trial Judge clearly limited the equitable lien which he found existed to one only on the interests of the consolidated libellants as lienors.

As such they were not benefitted by the service of the petitioner. The large majority of the wharfage service, if not all of it, was rendered to benefit the cargo and not for the protection of the ship or the preservation of the lien upon her and the benefit, if any, derived from not moving the *Poznan* to another dock, was a benefit to the consolidated libellants solely as cargo owners, and not at all as lienors, since the ship could have been as well preserved at some other pier which might have been secured at a little over one-tenth the price which appellee charged for its pier. Subsequent to March 11th, 1921, the vessel was docked at one of the City piers where the charge was \$29.49 per day (R. 20) as compared to \$250, the price of petitioner's pier.

The interests of the consolidated libellants of whom respondent was one, were divergent. Those whose cargo was all on the dock would not have wished further confusion and delay in getting their cargo, caused by the unloading of more cargo on an already congested dock, and those whose cargo was all on the ship would have preferred to have the vessel moved to another dock where their consignments could be discharged more expeditiously, while those who had received all their cargo were not interested at all.

The proceeds of the *Poznan* were not increased in amount or their value otherwise enhanced by reason of the services rendered by the petitioner, and hence the

respondent was not thereby enriched, unjustly or otherwise.

The test of unjust enrichment is benefit to the defendant, not detriment to the plaintiff. The law is clear that where a recovery is allowed on a quasi contractual theory of unjust enrichment, the measure of damages is the unjust enrichment of defendant and not the loss of plaintiff. An illustration of this is a case where a contract is void because of the Statute of Frauds, but a recovery in *quantum meruit* is nevertheless allowed. *Gazzam v. Simpson*, 114 Fed. 71; *Dowling v. McKenney*, 124 Mass. 478; *Matthews v. Davis*, 6 Humpf. 324; *Henderson v. Bunker*, 1895, 58 N. J. L. 26. This rule is stated by Keener, *Quasi Contracts*, as follows:

"It is not, however, sufficient to enable the plaintiff to recover for him to prove that he has suffered damage in consequence of the defendant's breach of the contract. He must show that the defendant will, if he is not compelled to pay the plaintiff for that which he has received from the plaintiff, unjustly enrich himself at the plaintiff's expense" (p. 279).

C. THE PETITIONER HAS ALREADY BEEN PAID THE REASONABLE VALUE TO THE "POZNAN" OF THE BERTHING OF THE VESSEL.

The petitioner seeks to establish an equitable claim on the theory that it rendered a valuable service for which it should be paid. The answer to this contention is that the petitioner has already been paid the reasonable value of its alleged services and obviously a claim for anything in excess of reasonable value cannot be supported on equitable grounds.

The situation is strikingly similar to that in *The St. Paul*, C. C. A. 2nd, 1921, 271 Fed. 265, on which the petitioner relies. In that case the Circuit Court of Appeals said:

"* * * if it was preferred to keep her at Pier 32, the charge must be reasonable for the *St. Paul*, not for Pier 32 under ordinary conditions. In fact the order appealed from awarded \$2,625 for the first 21 days of the 82-day period. We think the award should have been a reasonable charge for 82 days, and some evidence of what a reasonable charge was is shown by what it cost to berth the *St. Paul* from October 8th to November 24th, when she was at last sold. Applying this measure, Hudson Company has by the award of \$2,625 been, if anything, overpaid" (p. 267).

In other words, the proceeds of the vessel were held to be chargeable with the reasonable cost of the actual berthing but not for any larger charge based on benefits to the cargo.

In the case at bar when the Marshal contracted for wharfage for *The Poznan*, he secured it at \$29.49 per day (R. 20).

In *The Scow 15*, 88 Fed. 305, 92 Fed. 1008 (C. C. A., 2nd Circ.), the Court held that the rate of wharfage prescribed by the New York Statute in the absence of an express contract with the party to be charged, controlled the rates for wharfage furnished vessels, and that a customary rate of wharfage could not control the rates fixed by the laws of the State of New York, 1882, Section 798, affirming 88 Fed. 305, in which the Statute is set out.

In *The Antonio Zambrana*, 88 Fed. 516 (D. C. E. D., N. Y.), Judge Thomas held that when a vessel in charge of her Marshal was sent by him to a wharf without any contract as to charges, the wharfinger is entitled to the maximum rate fixed by the State Statute of New York, and that when a statute fixes a rate which can be charged for a service given by a person having a public relation such as a wharfinger, he is entitled to receive such sum in the absence of a contract for a less amount, though the actual market rates are much lower.

In *The Allan Wilde*, 255 Fed. 171 (C. C. A., 2nd Circ.), 264 Fed. 291, it was held that the statutory New York wharfage governed in the absence of an express agreement to the contrary.

In *The M. L. C. No. 10*, C. C. A. 2nd, 1926, 10 Fed. (2nd) 699, it was held that where lighters used wharves, even where they knew that the customary charges thereat were greater than the New York statutory rates, or even where notice of such customary rates was given, still such lighters could not be held for wharfage at more than the New York statutory rate in the absence of their express agreement to pay more. It is interesting to note that the libellant in the *Southern Cross* was the New York Dock Company, the petitioner herein.

This case in effect overrules the decision in *Beard v. Marine Lighterage Corporation*, 1924, 296 Fed. 146 (D. C. E. D., N. Y.), in so far as that case held that a ship owner who uses a wharf after notice of the scale of charges, is liable in accordance with such scale.

In the absence of an express agreement by the Mar-

shal, therefore, the most that could be awarded on an implied contract, if one could possibly be implied from the facts, as a charge against the vessel, was the wharfage at the rate fixed by the New York Statute. This Statute, set forth at length in the *Beard* case (p. 148), provides that it shall be lawful to charge and receive within the City of New York wharfage from every vessel using or making fast to any pier, wharf or bulkhead within the City for every day or part of a day as follows:

"From every vessel of two hundred tons burden and under, two cents per ton; and for every vessel over two hundred tons burden, two cents per ton for each of the first two hundred tons burden, and one-half of one cent per ton for every additional ton * * *" (Greater N. Y. Charter, Section 859; Laws 1901, ch. 466).

For the tonnage of the *Poznan* (8,405.72 gross) wharfage at this rate would be a little less than what the Marshal actually paid after March 11th. The *Poznan* was at Pier 6, 78 days, and at \$29.49 a day, wharfage would amount to \$2,300.22. But the petitioner has already received \$9,500 on account of said wharfage (R. 10), so that applying the measure approved in *The St. Paul* case the petitioner has already been greatly overpaid.

Petitioner's witnesses Becker and Firth testified that the reasonable value of the use of one side of a pier for berthing at the time was from \$50 to \$75 per day (R. 67, 68, 74). At this rate the wharfage for the 78 days would amount to \$5,850, so that even on that theory of the case petitioner was greatly overpaid.

It is difficult to understand how the District Court, after first practically deciding that only the berthing charge of \$29.49 per day could be allowed after February 18th when the cargo was all out of the vessel, could

on any theory of the case have allowed more than that rate or the New York statutory rate for that period, including the period after the cargo was all off the pier.

It is also noteworthy that the petitioner has already received about 36% of its claim, whereas the consolidated libellants have received only 17% of their claim (R. 131-2).

D. PETITIONER'S CLAIM THAT RESPONDENT IS ESTOPPED FROM CLAIMING PROCEEDS AS AGAINST IT IS UNSOUND.

Petitioner's argument on this point (arts. p. 25, on the false assumption that the arrest of the vessel by the Marshal terminated the contract of her owner for the wharfage. No argument or citation is made or given to sustain this. It is elementary law that the seizure of a vessel by the Marshal would not terminate any contract made by her owner with reference thereto, unless there were some specific provision to that effect in the contract. Even if the Marshal refused to permit the vessel to remain at the wharf, the petitioner would still have a cause of action against the owner for failure to keep the vessel there and pay the wharfage. The fact that the petitioner has been denied a lien does not affect in any way the cause of action against the owner under its contract, and instead of cancelling or terminating the contract, the petitioner, as we have seen, expressly extended it by written agreement in December, 1921 (R. 13, 17, 18) so as to provide for payments as late as June, 1922. The statement that the use of the wharf was at the instance and for the benefit of the respondent and other consolidated libellants merely begs the question. We have already proven that it was never at their instance, and in the case of many consolidated libellants, not for their

benefit. Part of the cargo was discharged over the steamer's side into lighters (R. 106). Petitioner, in discussing this point, loosely classes all the cargo owners as consolidated libellants, which they were not; and there is no evidence that they were. But where is the estoppel claim here? What has been said or done by respondent which has misled the petitioner and which it would be inequitable for petitioner to disaffirm? All these elements are necessary for an estoppel, which seems to be all on the other side. Petitioner, by permitting the steamer to remain at the wharf without terminating its contract with her owner, or notifying either the Court or the consolidated libellants that it was letting an enormous bill for unpaid wharfage accumulate, for which it was claiming a lien, surely should be estopped from claiming one. Can it be for a moment doubted that if the consolidated libellants had known that they were to be muled with a large sum for wharfage at a totally unsuitable pier, at which it took the vessel over two months and a half to discharge, they would have done their best to get the vessel removed to a suitable wharf, even if several of the shippers still objected?

POINT IV.

A lien for wharfage furnished on the order of the owner does not arise in the absence of an express agreement to give a lien.

- A. THE COURT BELOW PROPERLY DID NOT DECIDE WHETHER WHARFAGE IS A "NECESSARY" UNDER THE ACT OF 1920.

The Circuit Court of Appeals in this case held that no lien arose under the general maritime law because

the contract was made with the owner and not with the master or agent, and because there was not any understanding express or implied that a lien should be given (R. 158-9). The Court below then referred to the enlargement of the right to a maritime lien by virtue of the Acts of 1910 and 1920. After noting that the question of what is now included in the word "necessaries" has not been ultimately determined (R. 160), the Court concluded that the question of whether wharfage is a "necessary" within the meaning of the Act of 1920 was not important in the view of the case taken and said "we express no opinion concerning it at this time" (R. 161).

Under the contentions and views dealt with in other parts of the brief, it is clear that the position of the respondent is the same as that taken by the Circuit Court of Appeals. As the petitioner, however, both in its petition for a writ of certiorari and in its brief, has stressed this question, its contentions must be dealt with, although not necessary to a proper decision of this case.

The petitioner contends in Points III and IV of its brief that under the general maritime law and under the Merchant Marine Act of June 5, 1920, a maritime lien arose for wharfage rendered under its contract with the Polish-American Navigation Corporation.

From paragraphs 4 and 5 of the agreed statement of facts, it appears that on November 30, 1920, the petitioner, New York Dock Company, and Polish-American Navigation Corporation, owner of the *Poznan*, entered into an agreement for the use of Pier 6 by the *Poznan* to discharge her cargo, for which her owner agreed to pay \$250 per day, the charge to begin at 7 a. m. December 1, 1920, and to continue up to the time the steamer left and/or all cargo was removed; that said agreement

was not made with the master of the *Poznan*, which at that time was not in port; that the steamer arrived at Pier 6 during the afternoon of December 2, 1920; and that on the same afternoon the vessel was arrested and taken into custody by the United States marshal for the Southern District of New York (R. 8, 9).

As a lien for wharfage could not under any circumstances arise except as and when the services were actually rendered to the vessel, it is obvious that a maritime lien for wharfage could not have come into existence at least until the time of the *Poznan's* arrival at Pier 6 on the afternoon of December 2nd, a few minutes before the marshal arrested her. *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 1920, 254 U. S. 1; *Osaka Shoshen Kaisha et al. v. Pacific Export Lumber Company*, 1923, 260 U. S. 490, 499, 506.

B. THE STATUS OF WHARFAGE FURNISHED ON THE ORDER OF THE OWNER BEFORE THE LIEN ACT OF 1910.

No maritime lien arose under the general maritime law unless the credit of the vessel was pledged either by express contract, by presumption of law, or by inference from special facts. In this case, the contract between the petitioner and the shipowner did not contain any express provision concerning a lien. There is not any basis on which a provision to give a lien could be implied into the contract. In fact, the affirmative evidence is that the parties intended that there should not be a lien and that the wharfinger placed reliance exclusively on the Polish-American Navigation Corp.; because the agreement was not made with the master but with the treasurer of the company (R. 8), the wharfinger rendered its bill to the owner and not to the vessel

(R. 9), payments on account from the Polish-American Navigation Corp. were accepted at various times from December 27, 1920, to December 16, 1921 (R. 9-10), no distinction was made by the petitioner between charges for the time before and charges for the time after the arrival of the vessel at the pier (Exhibit C; R. 21), the charges were not based on the tonnage of *The Poznan* (R. 21), and the contract included services for which there obviously could be no lien against the vessel (R. 8).

The facts in many respects are similar to those in *The Advance*, 1894, 60 Fed. 766, affirmed C. C. A. 2d 1896, 71 Fed. 987, in which case Judge Addison Brown denied a lien for wharfage on the ground that the dealings were upon a personal contract between the two companies, which did not look to any credit of the ship but only to the personal responsibility of the owner, and upon the further ground that whatever wharfage privileges were furnished, were furnished under a contract which for a single price per day embraced other valuable considerations, the supply of which would give no lien upon the ship. The Court referred to the excess of the contract rates over the statutory rates, to the fact that the price was not according to tonnage like usual wharfage rates, to the requirement of payment irrespective of the presence of any steamer, to the demand upon the owners for payment, and to the failure to assert a lien until after the owner's failure. 60 Fed. 768.

Before the enactment of the Lien Act of 1910, it was well settled that a lien for supplies furnished on the order of the owner did not arise in the absence of an express or an implied agreement to give it. *The St. Jago de Cuba*, 1824, 9 Wheat. 409, 416, 417; *The Kalorama*,

10 Wall. 204; *The Valencia*, 1897, 165 U. S. 264, 270; *The Stromba*, C. C. A. 2nd, 1892, 53 Fed. 281, 283-4; *The C. W. Moore*, 1901, 107 Fed. 957, 958; *The Cimbria*, 1914, 214 Fed. 131, 132.

The basis of this theory was laid down in *The St. Jago de Cuba*, 1824, 9 Wheat. 409, in which this Court analyzed the basic reasons for the creation of implied maritime liens as follows:

"The whole object of giving admiralty process and priority of payment to privileged creditors, is to furnish wings and legs to the forfeited hull, to get back for the benefit of all concerned; that is, to complete her voyage.

There are two considerations that fully illustrate this position. It is not in the power of anyone but the shipmaster, not the owner himself, to give these implied liens on the vessel; * * *

For these purposes, the law maritime attaches the power of pledging or subjecting the vessel to material-men to the office of shipmaster; and considers the owner as vesting him with those powers by the mere act of constituting him shipmaster. The necessities of commerce require that, when remote from his owner, he should be able to subject his owner's property to that liability, without which, it is reasonable to suppose, he will not be able to pursue his owner's interests. But when the owner is present the reason ceases, and the contract is inferred to be with the owner himself, on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived." P. 416-7.

The question was again considered in *The Kalorama*,

10 Wall. 204, 214, 215; and the law on this point in effect restated by this Court in *The Valencia*, 1897, 165 U. S. 264, 271, as follows:

"In the absence of an agreement, express or implied, for a lien, a contract for supplies made directly with the owner in person is to be taken as made 'on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived'. *The St. Jago de Cuba*, 9 Wheat. 409, 416, 417."

At pages 38 and 46 of its brief, the petitioner cites an extract from the *St. Jago de Cuba*, *supra*, to show that the principle announced in that opinion does not apply to wharfage. The report does not indicate any of the facts regarding the minor claim for wharfage, which is referred to only in three lines of the opinion. In view of the careful and thorough consideration of the question of the effect of a contract by the owner on the creation of maritime liens for supplies, it is scarcely to be believed that this Court intended to make an exception in the case of wharfage without any expression to that effect; particularly when it is considered that the allowance of that wharfage claim may obviously be explained on the ground that it was furnished on the order not of the owner but of the master.

Ex Parte Easton, 1877, 95 U. S. 68, quoted from extensively at page 42 of the petitioner's brief, does not justify the inference placed upon it. It affirmatively appears that there was no contract whatever for the barge in question, which went to the libellant's wharf and by remaining there incurred wharfage charges without any action by the owner whatever. The real point in

that case was as to the maritime character of wharfage and the point actually decided by this Court on writ of prohibition was that the District Court had jurisdiction in admiralty of such a claim.

Petitioner has apparently misunderstood certain remarks of Chief Justice Marshall in the case of *The Little Charles*, 1818, 1 Brock. 347; F. C. No. 15612; petitioner's brief, page 42. The master, it is true, is authorized by the owner to pledge the credit of the vessel in foreign ports and as such contracts are not the master's own contract for which he is responsible, it must be assumed, in the absence of specific proof, that he, in making the contract, intended to use the power conferred on him of pledging the vessel. Where the contract is made by the owner the presumption is directly to the contrary. Undoubtedly the owner would have the authority to pledge his own ship should he so intend but no inference to that effect can be drawn from the mere fact of his making a contract for wharfage. The contract is not the vessel's contract unless made by her master. The point made at page 43 of the petitioner's brief, that a maritime lien is never created by agreement, is sound only if the statement is considered as limited to services and supplies of a non-maritime nature. A maritime lien cannot arise by agreement or otherwise in respect of a service which is not in its nature maritime; but even if the service is maritime, an express agreement to give a lien may be an additional requirement. *Vanderwater v. Mills*, 1857, 19 How. 82; *The Oneida*, 1923, 292 Fed. 403.

In the absence of an express agreement, a lien for wharfage will be implied where the circumstances are such as to raise a presumption that the parties intended a lien and that the wharfinger relied on

the credit of the vessel, as in the case of a contract by the master. The real reason for permitting a master in a foreign port to make a contract which will bind the credit of the vessel is that the owner is not present to make his own contracts on his own credit or to answer for them.

As far as supplies and repairs are concerned, when the vessel is in her home port, the necessity for the creation of a lien fails and likewise, whether or not she is in her home port, if her owner is present and himself makes the contract, there is no necessity of itself creating a lien but the lien arises only if it be expressly agreed to or inferred from other circumstances. Where, as in the present case, the contract was made with the owner for wharfage beginning to run before the arrival of the vessel, it is perfectly clear that the parties did not intend to pledge the credit of the vessel and under the law as it existed prior to the lien statutes, such a lien did not arise by operation of law.

C. THE STATUS OF WHARFAGE FURNISHED ON THE ORDER OF THE OWNER UNDER THE LIEN ACTS OF 1910 AND 1920.

The situation as it existed under the general maritime law was materially changed by the Lien Act of 1910, which specifically provided that in certain cases supplies and services ordered by the owner should constitute a lien, although it was still open to the supply-man to waive such lien (36 Stat. 604). The language of the later Act of 1920 is similar (41 Stat. 1005).

As wharfage is not specifically included in either of these statutes, the pre-existing rule of the general

maritime law is still in effect with respect to wharfage ordered by the owner himself, unless by proper implication, wharfage may be brought within the class of "other necessaries" specified in these statutes.

The underlying question of whether the petitioner could have had a maritime lien for this wharfage, irrespective of all the other questions discussed in other parts of this brief, depends ultimately on this question of construction.

Section 1 of the Act of June 23, 1910, c. 373, provides as follows:

"Any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel" (36 Stat. 604).

This section was re-enacted by the Act of June 5, 1920, c. 250, Sec. 30, Subsec. P, to read as follows:

"Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel" (41 Stat. 1005).

Careful investigation has revealed only one case in which the question of whether wharfage is a "necessary" under the Act of 1920 has been expressly decided. *The Suelco*, 1922, 286 Fed. 286.

That case was a libel *in rem* against the SS. *Suelco* for wharfage. The Court held as follows:

"The lien claimed is a maritime lien. Wharfage is, of course, a necessity but not a 'necessary' in the sense in which the word is used in the Statute of 1920. The *Andrew J. Smith* (D. C.), 263 Fed. 1004; *The Hatteras*, 255 Fed. 518, 166 C. C. A. 586; *The J. Doherty* (D. C.), 207 Fed. 997; *The Muskegon* (C. C. A.), 275 Fed. 348." P. 288.

The petitioner contends on page 49 of its brief that in the District of Maryland it has been held that the Act is applicable to wharfage. *The West Haven*, 1924, 297 Fed. 534. In that case, the particular point apparently was not raised and the opinion does not even refer to the status of wharfage under the Act of 1920. As the libel was dismissed without considering this question, *The West Haven* is scarcely authority contrary to *The Suelco*.

Under the 1910 Act it was held that towage and stevedoring did not come within the terms of the statute because they were not within the class indicated by the words "repairs and supplies". *The J. Doherty*, 1913, 207 Fed. 997; *The Muskegon*, 1921, 275 Fed. 117; affirmed 275 Fed. 348.

In *The Muskegon*, C. C. A. 2nd, 1921, 275 Fed. 348, Judge Hough held that "other necessaries" in the 1910

Act did not cover the services of a master stevedore, and expressed adherence to the views expressed in *The Oceania*, C. C. A. 2d, 1917, 244 Fed. 80, and *The Hatteras*, C. C. A. 2nd, 1918, 255 Fed. 518, in which decisions "other necessaries" were held not to cover towage. The Court referred to the reasoning in *The J. Doherty* as being "as fatal to appellant's contention regarding stevedoring as it was in respect of towage before by the act of 1920 the word 'towage' was specifically inserted. 'Other necessaries' mean matters *eiusdem generis* with repairs and supplies and that the charge of a master stevedore does not belong to that class is we think entirely plain." P. 350.

It is contended, however, that the changes in the wording of the Act of 1910 made by the Act of 1920 have broadened the scope of the Statute so as to include wharfage under certain language in recent decisions on stevedoring cited by the petitioner.

In *The Henry S. Grove*, 1922, 285 Fed. 60, a stevedore intervened and asserted a maritime lien under the Act of 1920. The Court compared the language of the two statutes and held that the express addition of "towage" and the insertion of "dry dock or marine railway" in that part of the act preceding the expression of "or other necessaries" has, by so doing, broadened the scope of the latter expression. P. 61.

It is submitted that this reasoning is not sound. The broadening of the meaning of the statute is said to depend on the transposition of the words "other necessaries"; but "other necessaries" having for many years received judicial construction, there would seem to be more reason to consider that the Legislature intended to carry over the fixed meaning of those words

rather than completely to alter such fixed meaning and merely by changing the position of these words to change their meaning to the exact opposite of the construction previously placed upon them. Such a result would seem to be in conflict with sub-section X of section 30 of the Merchant Marine Act of 1920, which in repealing the Lien Act of 1910 provides as follows:

"This section, however, so far as not inconsistent with any of the provisions of law so repealed, shall be held a reenactment of such repealed law * * *" (41 Stat. 1006).

The actual intention of Congress in passing the Ship Mortgage Act, 1920, was not to change the existing law as to maritime liens, except so as to include towage as a maritime lien, as is shown by the Conference Reports on the bill, *House Committee Reports, 66th Congress, Second Session, December 1, 1919-June 5, 1920*; Reports numbered 1093, 1102, 1107, dated June 2, 3, 4, 1920. Appended to each of these reports is "The Statement of the Managers on the Part of the House" which sets forth the Ship Mortgage Act, 1920, in full, designated as Senate Amendment No. 135. In each report there appears the following in the Managers' statement:

"The Senate Amendment also reenacts the Maritime Lien Act of 1910 with the additional grant of a lien for towage in the home port of a vessel, and the declaration that towage shall be presumed to be furnished upon the credit of a vessel."

The foregoing is all that is said in the reports about the maritime lien provisions of the Ship Mortgage Act, and the Managers' statement in each instance concludes

with a recommendation that the Senate amendment be adopted without change.

The Act of 1920 should, therefore, be construed in the same way as the Act of 1910, except insofar as its provisions are actually inconsistent with those of the earlier act.

As it is clear that towage and stevedoring were not considered as "other necessaries" under the Act of 1910, *The Hatteras*, C. C. A. 2nd, 1918, 255 Fed. 518; *The J. Doherty*, 1913, 207 Fed. 997, 999, 1000, and that it was necessary expressly to include towage in the Lien Act of 1920 in order that by the statute a lien therefor should arise in favor of towage supplied on the order of an owner, wharfage should not rest on any basis more favorable to the lienor. Therefore, a lien in favor of the wharfinger for wharfage rendered on the order of the owner should not be considered as within the statute in the absence of an express provision to that effect.

The extension of "other necessaries" to include wharfage is contrary not only to the terms of sub-section X and to the construction previously placed upon these words, but also to the policy repeatedly declared by this Court that maritime liens on account of their secret nature should not be extended by construction, analogy, or inference, and also to the policy that a statutory extension of a right should be construed strictly and not extended beyond the requirements of the plain language of the statute. *Vandewater v. Mills*, 1857, 19 How. 82; *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 1920, 254 U. S. 1, 11, 12; *New Bedford Dry Dock Co. v. Purdy*, 1922, 258 U. S. 96, 100; *Osaka Shosen*

Kaisha et al. v. Pacific Export Lumber Co., 1923, 260 U. S. 490, 499.

The argument that the change in the statute so as to place the words "dry dockin'" before instead of after the words "other necessaries" has the effect of bringing wharfage within the statute because it is of the same nature as dry docking, is not sound. Wharfage, strictly speaking, is a charge for the use of a wharf by a vessel in the ordinary course of her employment as an instrument of commerce; while dry docking is an incident to repairs or examination, the necessity for which in itself is scarcely consistent with the use of the vessel as an instrument of commerce at that particular time.

The nature of wharfage has been pointed out by this Court in the case cited by the petitioner, *In re Easton*, 1877, 95 U. S. 68, 73, 75, as follows:

"Wharf accommodation is a necessity of navigation, and such accommodations are indispensable for ships and vessels and water-craft of every name and description, whether employed in carrying freight or passengers, or engaged in the fisheries * * *." P. 73.

"Repairs to a limited extent are sometimes made at the wharf; but contracts of the kind usually have respect to the voyage, and are made to secure a resting-place for the vessel during the time she is being loaded or unloaded." P. 75.

Wharfage and dry docking are, therefore, not to be considered in the same class.

Finally, if the intention of Congress was to include wharfage among "other necessaries", it is difficult to understand why it was not specifically inserted in the

Act of 1920. The fact that towage was added suggests that the attention of Congress was directed to the exact services for which a lien should arise, even when ordered by the owner, and the omission of wharfage indicates that Congress intended that the lien law in this regard should remain as it was before the Act of 1920.

This view has the support of an experienced and learned admiralty practitioner, John W. Griffin, Esq., who writes in regard to this point as follows:

"It seems going rather far to assume that Congress, by the addition of the word 'towage' meant to bring in, by implication, all services which are, to use Judge Hough's phrase, 'convenient, useful and at times necessary' to the operation of a ship. If Congress, knowing the construction which the Courts have put upon the Act, meant to include anything besides towage, why did it not say so?"
Griffin, *The Federal Maritime Lien Act*, 37 Harv. Law Rev. 15, 21.

Some support for the result in *The Henry S. Grove* may be found, as Mr. Griffin states, in the enumeration among preferred maritime liens in sub-section M of the Ship Mortgage Act of a lien for the wages of a stevedore when employed directly by the owner. But it is likewise significant that a lien for wharfage does not appear in sub-section M as a lien, and in that respect wharfage is to be treated differently from stevedoring.

POINT V.

***The decision of the United States Circuit Court
of Appeals for the Second Circuit should be af-
firmed, with costs.***

Respectfully submitted,

HUNT, HILL & BETTS,
Proctors for Intervenor-Respondent.

GEO. WHITEFIELD BETTS, JR.,
MARK W. MACLAY,
EDNA F. RAPALLO,
Of Counsel.

New York, March 3, 1927.

Appendix A.

ACT JUNE 23, 1910 (36 Stat. 604, 605).

Section 1:

"Any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel."

Section 2:

"The following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel."

Section 3:

"The officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel, but nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement

for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

Section 4:

"Nothing in this Act shall be construed to prevent a furnisher of repairs, supplies, or other necessaries from waiving his right to a lien at any time, by agreement or otherwise, and this Act shall not be construed to affect the rules of law now existing, either in regard to the right to proceed against a vessel for advances, or in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed *in personam*."

Section 5:

"This Act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings *in rem* against vessels for repairs, supplies, and other necessaries."

Appendix B.

SHIP MORTGAGE ACT, 1920 (Section 30 of Merchant Marine Act, June 5, 1920), (41 Stat. 1004, 1005, 1006).

Subsection M:

"(a) When used hereinafter in this section, the term 'preferred maritime lien' means (1) a lien arising prior in time to the recording and endorsement of a preferred mortgage in accordance with the provisions of this section; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit *in rem* in admiralty for the enforcement of a preferred mortgage lien thereon, all pre-existing claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of subsection L shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court."

Subsection P:

"Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or do-

mestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel."

Subsection Q:

"The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel."

Subsection R:

"The officers and agents of a vessel specified in subsection Q shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel; but nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

Subsection S:

"Nothing in this section shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other neces-

saries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time, by agreement or otherwise; and this section shall not be construed to affect the rules of law now existing in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed *in personam*, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States.³

Subsection T:

"This section shall supersede the provisions of all State statutes conferring liens on vessels, in so far as such statutes purport to create rights of action to be enforced by suits *in rem* in admiralty against vessels for repairs, supplies, towage, use of dry dock or marine railway, and other necessaries."

Subsection X:

"Sections 4192 to 4196, inclusive, of the Revised Statutes of the United States, as amended, and the Act entitled 'An Act relating to liens on vessels for repairs, supplies, or other necessaries', approved June 23, 1910, are repealed. This section, however, so far as not inconsistent with any of the provisions of law so repealed, shall be held a reenactment of such repealed law, and any right or obligation based upon any provision of such law and accruing prior to such repeal, may be prosecuted in the same manner and to the same effect as if this Act had not been passed."

Appendix C.**GREATER NEW YORK CHARTER, §859.****Laws, 1901, ch. 466.**

§859. It shall be lawful to charge and receive, within The City of New York, wharfage and dockage at the following rates, namely: From every vessel that uses or makes fast to any pier, wharf, or bulkhead, within said city or makes fast to any vessel lying at such pier, wharf, or bulkhead, or to any other vessel lying outside of such vessel, for every day or part of a day except as hereinafter provided, as follows: From every vessel of two hundred tons burden and under, two cents per ton; and for every vessel over two hundred tons burden, two cents per ton for each of the first two hundred tons burden, and one-half of one cent per ton for every additional ton, except that, save as hereinafter provided, vessels known as North river barges, market boats and barges, sloops employed upon the rivers and waters of this state, and schooners exclusively employed upon the rivers and waters of this state shall pay for every such vessel under the burden of fifty tons, at the rate of fifty cents per day; for every such vessel of the burden of fifty tons, and under the burden of one hundred tons, at the rate of sixty-two and a half cents per day; for every such vessel of the burden of one hundred tons, and under the burden of one hundred and fifty tons, at the rate of seventy-five cents per day; for every such vessel of the burden of one hundred and fifty tons, and under the burden of two hundred tons, at the rate of eighty-seven and a half cents per day; and for every such vessel of the burden of two hundred tons, and under the burden of two hundred and

fifty tons, at the rate of one hundred cents per day; for every such vessel of the burden of two hundred and fifty tons, and under the burden of three hundred tons, at the rate of one hundred and twelve and a half cents per day; for every such vessel of the burden of three hundred tons, and under the burden of three hundred and fifty tons, at the rate of one hundred and twenty-five cents per day; for every such vessel of the burden of three hundred and fifty tons, and under the burden of four hundred tons, at the rate of one hundred and thirty-seven and a half cents per day; for every such vessel of the burden of four hundred tons and under the burden of four hundred and fifty tons, at the rate of one hundred and fifty cents per day; for every such vessel of the burden of four hundred and fifty tons, and under the burden of five hundred tons, at the rate of one hundred and sixty-two and a half cents per day; for every such vessel of the burden of five hundred tons, and under the burden of five hundred and fifty tons, at the rate of one hundred and seventy-five cents per day; for every such vessel of the burden of five hundred and fifty tons, and under the burden of six hundred tons, at the rate of one hundred and eighty-seven and one-half cents per day; for every such vessel of the burden of six hundred tons and upwards, to pay twelve and a half cents, in addition for every fifty tons in addition to the rate last mentioned, for every day such ship or vessel shall use or be made fast to any of said wharves; but no boat or vessel over fifty tons burden shall pay less than fifty cents for a day or a part of a day, and the class of sailing vessels now known as lighters shall be at one-half the first above rates. Every other vessel making fast to a vessel at any pier, wharf, or bulkhead within said city, or to another vessel outside of such vessel, or

at anchor within any slip or basin, when not receiving or discharging cargo or ballast, one-half of the first above rates; and from every vessel or floating structure, other than those above named, or used for transportation of freight or passengers, double the first above rates, except that floating grain elevators shall pay one-half the first above rates; and every vessel that shall leave a pier, wharf, bulkhead, slip or basin, without first paying the wharfage or dockage due thereon, after being demanded of the owner, consignee, or person in charge of the vessel, shall be liable to pay double the rates established by this section.

Ford

